

**A REVIEW OF THE INTERPRETIVE RULE  
REGARDING THE APPLICABILITY OF CLEAN  
WATER ACT AGRICULTURAL EXEMPTIONS**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CONSERVATION, ENERGY,  
AND FORESTRY  
OF THE  
COMMITTEE ON AGRICULTURE  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED THIRTEENTH CONGRESS

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## **A REVIEW OF THE INTERPRETIVE RULE REGARDING THE APPLICABILITY OF CLEAN WATER ACT AGRICULTURAL EXEMPTIONS**

**THURSDAY, JUNE 19, 2014**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY,  
COMMITTEE ON AGRICULTURE,  
*Washington, D.C.*

The Subcommittee met, pursuant to call, at 10:05 a.m., in Room 1300 of the Longworth House Office Building, Hon. Glenn Thompson [Chairman of the Subcommittee] presiding.

Members present: Representatives Thompson, Gibbs, Tipton, Crawford, Ribble, Noem, Benishek, Walz, Negrete McLeod, Kuster, Nolan, McIntyre, Schrader, DelBene, and Peterson (*ex officio*).

Staff present: Brent Blevins, John Goldberg, Josh Maxwell, Nicole Scott, Patricia Straughn, Skylar Sowder, Anne Simmons, Keith Jones, Liz Friedlander, Mary Knigge, John Konya, and Riley Pagett.

### **OPENING STATEMENT OF HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA**

The CHAIRMAN. Good morning, everybody. This hearing of the Subcommittee on Conservation, Energy, and Forestry entitled, *A Review of the Interpretive Rule Regarding the Applicability of the Clean Water Act Agricultural Exemptions*, will come to order.

I want to welcome everyone this morning. Good morning. Welcome to today's Conservation, Energy, and Forestry Subcommittee hearing. One of the foremost issues facing agriculture today is newly proposed rules released by the Environmental Protection Agency and the U.S. Corps of Engineers concerning the Clean Water Act's definition of the *waters of the United States*. Now, we have heard much publicly from the Obama Administration about their perceived need for this rule, and there have also been many strong concerns voiced from stakeholders and Members of Congress, including myself and several Members of this Subcommittee. Many experts have suggested that upon closer review, the specifics of the new rule appear to be nothing more than a power grab meant to expand the jurisdiction of these two agencies into areas the Federal Government does not currently have a foothold.

However, an important related issue that has not received as much attention is the new Interpretive Rule known as the IR, and the Memorandum of Understanding between the EPA, the Army Corps and the USDA. This document was released concurrently

with the Waters of the U.S. proposed rule. Now, the Interpretive Rule, which was enacted immediately, presumes to offer farmers a dredge-and-fill permit exemption for normal farming, ranching and silvicultural activities under section 404 of the Clean Water Act if, and only if, those farmers comply with conservation guidelines that until this time have historically been voluntary.

Now, this agreement identifies 56 conservation practice standards established by the National Resources Conservation Service and will automatically meet the agriculture exemption for normal farming activities conducted in the waters of the United States unless you are receiving government assistance. The NRCS standards have always been a voluntary guideline for a farmer or rancher in jurisdictional waters. But under this enacted rule, a producer must now meet a federally mandated standard. Failure to do so would create a situation where farmers must obtain permits under the Clean Water Act if the EPA or the Army Corps agree to authorize them or face stiff penalties. In fact, the enforcement actions under the Clean Water Act could cost upwards of \$37,000 per day.

Until this point, the NRCS has always had sole authority to design and amend conservation practice guidelines. However, under the new Memorandum of Understanding, the EPA and the Army Corps of Engineers are free at any time to amend the list of conservation practices that would qualify for these limited exemptions.

It is beyond my comprehension why these agencies have not chosen to include their list of 56 practices in the regulation. Doing so would guarantee regulatory transparency and provide producers input if or when the agencies chose to restrict the list of practices that would qualify for an exemption.

The Obama Administration has said that the Interpretive Rule is intended to clarify what normal farming practices can be exempt from dredge-and-fill permits on a water of the United States under the Clean Water Act. The Administration has been very adamant to point out that they do not intend for this to be a power grab or expansion of authority but merely a way to eliminate ambiguity for producers and landowners. However, we will hear from farmers and other experts today that this list of practices maybe unnecessary. Many producers believe that listing these approved conservation practices provides nothing that the producers don't already have and only invites more Federal regulations. And while the Obama Administration has created this list of supposed exemptions under the dredge-and-fill permitting, farmers still have no protection under this proposal from the numerous other mandates of the Clean Water Act including pesticide application permits under section 402.

Under the Clean Water Act proposal, more farmers and ranchers will be captured under the Federal Government's jurisdiction. The new exemptions agreed to by the EPA, the Army Corps of Engineers and USDA have only created a new set of government regulatory standards that farmers and ranchers must now meet.

I hope today's testimony may shed light on the reasoning for the Administration's Interpretive Rule and for the Memorandum of Understanding and will allow our witnesses to voice their concerns on this issue.

Last week the Administration announced an extension on the comment period for both the waters of the United States proposed rule and the Interpretive Rule. It is my hope that public comment combined with this hearing and other Congressional action will persuade the Administration to withdraw the current proposed waters of the United States and Interpretive Rules and start from scratch.

Now, I thank each of our witnesses for being here today and I look forward to hearing your testimony.

[The prepared statement of Mr. Thompson follows:]

PREPARED STATEMENT OF HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS  
FROM PENNSYLVANIA

Good morning. I want to welcome everyone to today's Conservation, Energy, and Forestry Subcommittee hearing.

One of the foremost issues facing agriculture today is the newly proposed rules released by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers concerning the Clean Water Act's definition of the waters of the United States.

We have heard much publicly from the Obama Administration about their perceived need for this rule.

There have also been many strong concerns voiced from stakeholders and Members of Congress, including myself and several Members of this Subcommittee.

Many experts have suggested that, upon closer review, the specifics of the new rule appear to be nothing more than a power grab meant to expand the jurisdiction of these two agencies into areas the Federal Government does not currently have a foothold.

However, an important related issue that has not received as much attention is the new Interpretive Rule—known as the “IR”—and the Memorandum of Understanding (MOU) between EPA, the Army Corps, and the USDA.

This document was released concurrently with the Waters of the U.S. proposed rule.

The Interpretive Rule, which was enacted immediately, presumes to offer farmers a “dredge and fill” permit exemption for normal farming, ranching, and silvicultural activities under section 404 of the Clean Water Act, if—and only if—those farmers comply with conservation guidelines that until this time have historically been voluntary.

This agreement identifies 56 conservation practice standards established by the Natural Resources Conservation Service (NRCS) that would automatically meet the agriculture exemption for normal farming activities conducted in waters of the U.S.

Unless you are receiving government assistance, the NRCS standards have always been a voluntary guideline for a farmer or rancher in jurisdictional waters.

But under this enacted rule, a producer must now meet a federally mandated standard.

Failure to do so, would create a situation where farmers must obtain permits under the Clean Water Act—if the EPA or Corps agree to authorize them—or face stiff penalties.

In fact, the enforcement actions under the Clean Water Act could cost upwards of \$37,000 per day.

Until this point, the NRCS has always had sole authority to design and amend conservation practice guidelines.

However, under the new Memorandum of Understanding, EPA and the Corps are free at any time to amend the list of conservation practices that would qualify for these limited exemptions.

It is beyond my comprehension why these agencies have not chosen to include their list of 56 practices in regulation.

Doing so would guarantee regulatory transparency, and provide producers' input, if or when the agencies choose to restrict the list of practices that would qualify for an exemption.

The Obama Administration has said the Interpretive Rule is intended to clarify what normal farming practices can be exempt from dredge and fill permits on a water of the U.S. under the Clean Water Act.

The Administration has been very adamant to point out that they do not intend for this to be a power grab or expansion of authority, but merely a way to eliminate ambiguity for producers and landowners.

However, we will hear from farmers and other experts today that this list of practices may be unnecessary.

Many producer groups believe that listing these approved conservation practices provides nothing that producers don't already have, and only invites more Federal regulation.

And while the Obama Administration has created this list of supposed exemptions under dredge and fill permitting, farmers still have no protection under this proposal from the numerous other mandates of the Clean Water Act—including pesticide application permits under section 402.

Under the Clean Water Act proposal, more farmers and ranchers will be captured under the Federal Government's jurisdiction.

The new exemptions agreed to by EPA, the Corps and USDA have only created a new set of government regulatory standards that farmers and ranchers must meet.

I hope today's testimony may shed light on the reasoning for the Administration's Interpretive Rule and the MOU and allow our witnesses to voice their concerns on this issue.

Last week the Administration announced an extension on the comment period for both the Waters of the U.S. proposed rule and the Interpretive Rule.

It is my hope that public comments, combined with this hearing and other Congressional action, will persuade the Administration to withdraw the current proposed Waters of the U.S. and Interpretive Rules and start from scratch.

I thank each of our witnesses for being here today and I look forward to hearing your testimony.

I now recognize the Ranking Member for his opening statement.

The CHAIRMAN. I now recognize my good friend, the Ranking Member, for his opening statement.

#### **OPENING STATEMENT OF HON. TIMOTHY J. WALZ, A REPRESENTATIVE IN CONGRESS FROM MINNESOTA**

Mr. WALZ. Well, thank you, Chairman Thompson. I want to thank my friend also for giving us this opportunity to discuss the issue of clean water, the impact on agriculture and conservation and our rural communities. Thank you also, Chairman, for putting together a very strong panel. I am appreciative. Under Secretary Bonnie, thank you for being here and helping give your input and your perspective on this, and to the witnesses who are here. It is a strong panel representing producers as well as the conservation communities, and for that, I am grateful.

We are here today to review the Interpretive Rule, NRCS's role and the applicability of the Clean Water Act agricultural exemptions. The premise of the Interpretive Rule is conservation practices which benefit water quality and remain consistent with NRCS technical standards should be exempt from Clean Water Act 404(a) permitting. I think the central question for us in this discussion will be whether or not the Interpretive Rule incentivizes conservation practices and whether those practices actually enhance water quality while at the same time providing clarity to producers who deserve certainty.

We all know that this is a business where there are lots of uncertainties. As we speak now, much of my district is underwater, and in one county alone, we have lost 100,000 acres of soybean and corn crops, and so those uncertainties and the impacts of water, lack thereof, too much and how those producers are able to farm their land is critical.

Conservation is this Subcommittee's bread and butter too. Members of our staff worked tirelessly throughout the farm bill process to craft policies that incentivize conservation, promotes sustainable practices and protect our watersheds. We have proven that we don't have to fall victim to the false dichotomy of conservation over agriculture. We found solid conservation practices can and do lead to stronger economic conditions. We have discussed the environmental and economic benefits of conservation practices to farmers many times here. Oftentimes it is the family farmer who is the best conservationist and have to be because their most valuable asset is the land.

Sportsmen and farmers have had a very close relationship, and we have witnessed this throughout the farm bill process. Many farmers are sportsmen, and many sportsmen hunt on private land owned by farmers. Hunting and fishing and general outdoor recreation is a prime example and one of the reasons we invited representatives from the Izaak Walton League here. Forty-seven million Americans hunt and fish. Outdoor recreation is a nearly \$700 billion industry and supports well over a million jobs. This industry relies on clean water and productive wetlands, but it also relies on a collaborative working relationship with the agricultural sector and private landowners.

I don't have to look any further than my own district to see the significance of this relationship. I have farmers in southeast Minnesota who use NRCS technical assistance and leverage EQIP dollars to improve management practices, increase overall productivity on their lands, clean up streams and open those streams to trout fishermen. Now those very streams are some of the best in the upper Midwest, and sportsmen flock from surrounding states to fish those streams as well as the producer producing more off the land. Everyone is a winner when we craft good policy which incentivizes conservation practices. The sportsmen and agriculture sector have worked together in the past to achieve significant victories for both conservation and production agriculture. I am optimistic that in the spirit of pragmatism that both groups demonstrated throughout the farm bill debate will continue to guide future policy discussions.

I look forward to discussing the issue of the Interpretive Rule, the impact it is going to have on both producers and conservation in a good-faith effort to make sure that conservation is incentivized and disagreements are resolved.

With that, I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

The chair would request that other Members submit their opening statements for the record so the witnesses may begin their testimony to ensure there is ample time for questions.

I would like to welcome our first witness to the table, Mr. Robert Bonnie. Mr. Under Secretary, thank you for being here. Mr. Bonnie serves as the Under Secretary for Natural Resources and Environment with the USDA.

Mr. Bonnie, please begin when you are ready.

**STATEMENT OF ROBERT BONNIE, UNDER SECRETARY FOR  
NATURAL RESOURCES AND ENVIRONMENT, U.S.  
DEPARTMENT OF AGRICULTURE, WASHINGTON, D.C.**

Mr. BONNIE. Good morning, Mr. Chairman and Ranking Member Walz. I appreciate the opportunity to be here today.

Thank you for the opportunity to be here today to discuss the Interpretive Rule, which expands the number of agricultural exemptions from permitting under the Clean Water Act.

The Interpretive Rule was released by the Environmental Protection Agency at the same time that the proposed rule on jurisdiction of the Clean Water Act was released for public comment. Today I would like to describe the Interpretive Rule for the Subcommittee, USDA's role in helping to shape it, and the anticipated benefits for agriculture, conservation and the nation's waters.

The Interpretive Rule is EPA's interpretation of the existing exemption for normal farming, ranching and silvicultural practices under the Clean Water Act related to discharges of dredged and fill material. Under current law, normal farming activities are exempt when they are part of an established farming operation and do not change the reach or use of waters. Normal farming includes things like plowing, cultivating, minor drainage, harvesting, and upland soil and water conservation practices. The Interpretive Rule does not affect any of those existing agricultural exemptions. Indeed, it adds to them, making even more room for agriculture. This is an important point because there has been some criticism that the Interpretive Rule might narrow the exemptions for agriculture. It doesn't, and the Interpretive Rule itself is crystal clear on this point. The rule text says that the rule "does not affect in any manner the scope of agriculture, silviculture and ranching activities currently exempt from permitting."

With the Interpretive Rule, now an additional 56 conservation practices from stream crossings to wetland enhancement carried out in waters of the United States are no longer subject to permitting requirements. Producers can follow the conservation practice standard and implement practices on their own. They don't need to notify the Army Corps or the EPA. They don't need to ask for review or certification of the exempt practice from NRCS or anyone else, and they don't need to apply for a permit. Producers may want to get technical help from NRCS if they have questions about a conservation practice but it is not a requirement. And use of the exemption is entirely voluntary.

In addition, the Interpretive Rule is based on implementation of NRCS's conservation practices, which have proven to be very popular with producers as evidenced by the strong interest in USDA farm bill conservation programs, all of which are tied to implementation of those conservation practices. The Interpretive Rule is about increasing options and promoting voluntary conservation to benefit agriculture and water quality.

Let me tell you a little bit about USDA's role in the development of the Interpretive Rule. USDA worked closely with EPA and the Army Corps to find new opportunities and flexibility for agriculture that fit with producers' operational objectives and also provide water quality benefits. USDA reviewed its over 160 NRCS conservation practices and evaluated whether, first, those conservation

practices might be carried out in waters of the United States, and second, the conservation practice is designed to enhance and protect water quality. USDA also entered into a Memorandum of Understanding with EPA and the Army to guide how the agencies will work together to manage the list of exempted conservation practices. At a minimum, the agencies will review the risk annually to see how the exemptions are working and if changes are needed. The MOU also clarifies the role and responsibilities of each agency.

NRCS's role remains the same as it has been for over 75 years. We work with farmers, ranchers and other land managers to assist with the voluntary efforts to plan and install conservation practices that meet their needs and objectives. NRCS has sole responsibility for developing, reviewing and revising its conservation practice standards to guide that work with producers.

We are already seeing positive examples such as in North Carolina where a stream channel restoration project is now moving forward. There, landowners who are following NRCS practice standards to implement the stream channel restoration project are now able to move forward without notifying the Army Corps or obtaining a permit. As a result, the producers more quickly restore the channel while foregoing the costs of a permit. Further, NRCS staff time is freed up to provide direct technical assistance to other producers.

The Interpretive Rule signals a new opportunity for recognizing the value of producers' conservation efforts. There is no sector of the economy that cares more about water than agriculture. America's farm and ranch families make decisions every day that help to improve and secure our water resources. The Interpretive Rule will make those decisions and actions a little easier and produce a substantial benefit for farms and ranches, their communities and the nation as a whole.

Mr. Chairman, this concludes my statement. Thank you again for the opportunity to be here today. I am happy to answer any questions.

[The prepared statement of Mr. Bonnie follows:]

PREPARED STATEMENT OF ROBERT BONNIE, UNDER SECRETARY FOR NATURAL RESOURCES AND ENVIRONMENT, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, D.C.

Good morning, Chairman Thompson, Ranking Member Walz, and Members of the Subcommittee. Thank you for the opportunity to be here today to discuss the Interpretive Rule (IR) regarding the applicability of certain agricultural exemptions from section 404 permitting under the Clean Water Act (CWA).

The IR was released by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army, Civil Works (Army) at the same time that the agencies released their proposed rule on the jurisdiction of the CWA. While the IR stands on its own, it has been viewed in the context of the CWA proposed rule, resulting in widely divergent perspectives on the impact and role of the IR. Today, I would like to describe the IR, USDA's role in helping to shape the IR, and the benefits USDA anticipates for agriculture, conservation, and the nation's waters.

#### **The Interpretive Rule**

When a Federal agency provides a statement of how it interprets a statute, that statement is called an interpretive rule. The IR relates to the existing exemption for normal farming, ranching, and silvicultural practices under section 404(f)(1)(A) of the CWA regarding discharges of dredged and fill material into waters of the United States. With the IR, EPA and Army are recognizing shifts in agriculture since the 1970s when the CWA came into effect, and clarifying that certain con-

servation activities in waters of the U.S. following Natural Resources Conservation Service (NRCS) conservation practice standards are also exempt from CWA section 404 dredge and fill permitting requirements as “normal farming” activities.

The CWA exempts normal farming, ranching, and silvicultural activities, such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, and upland soil and water conservation practices when they are part of an established farming operation and do not change use of waters, and where the flow or circulation of those waters may not be impaired or the reach reduced. The IR clarifies that this existing exemption also includes 56 conservation practices, from stream crossings to wetland enhancement, which can occur in waters of the U.S. To be exempt, these practices must be implemented in accordance with the applicable NRCS conservation standards.

Specifically, the IR provides that: *“Normal farming necessarily includes conservation and protection of soil, water, and related resources in order to sustain agricultural productivity along with other benefits to environmental quality and continued economic development. Upland soil and water conservation practices are explicitly identified in the statute as ‘normal’ farming activities, and conservation activities within the waters of the U.S. that includes discharges in waters of the U.S. and that are designed to protect and enhance the waters of the U.S. have been determined to be of essentially the same character.”* [emphasis added] Just to be clear, the IR clarifies that the 56 additional agriculture conservation practices fall under the statutory exemption and do not require a section 404 permit.

The IR exemption is “self-implementing” meaning that *producers do not need to notify the regulatory agencies or seek review or certification*. This means that producers can follow the conservation practice standard and implement practices on their own, without NRCS involvement, and not be required to seek a 404 permit. Producers may choose to seek technical advice or assistance from NRCS, conservation districts, technical service providers, or others with agricultural conservation expertise to implement covered practices, but they are not required to do so. Further, there is no requirement that a producer choose to exercise the exemption. They may consult with the Army regarding how the CWA applies to their activities if that is their preference. The benefit of the IR is that it provides clarity for agricultural producers, promotes conservation, and benefits agriculture and water resources.

#### USDA Role in the IR

USDA worked closely with EPA and Army to evaluate opportunities to clarify the type of practices that occur in waters of the U.S. that may involve a discharge of dredge or fill material and result in water quality benefits, so that producers can more easily implement conservation measures that achieve their operational objectives.

USDA assisted EPA and Army by identifying NRCS conservation practices to be considered as exemptions through the IR. NRCS has over 160 conservation practices, which are designed and developed to assist producers in their voluntary conservation efforts to address their natural resource and operational objectives. NRCS conservation practice standards are science-based—drawing upon research, academic, and agricultural expertise. The standards are reviewed and updated on a scheduled basis, and are subject to public notice and comment to ensure wide opportunity for input. Final standards reflect public input and the best science—basic and applied—at the time.

In recommending specific practices to be exempt through the IR, NRCS evaluated if:

- The conservation practice could be applied in waters of the United States (*i.e.*, it is not entirely an upland-located conservation practice); and
- The conservation practice is designed to enhance and protect water quality. The resulting list of practices complements the previously recognized exemptions for normal farming and ranching activities and upland soil and water conservation practices and provides new flexibility for agriculture.

A Memorandum of Understanding (MOU) signed by EPA, Army, and USDA outlines how the three agencies will collaborate on maintaining and managing the list of conservation practices exempted under the IR. The cooperating agencies will convene on at least an annual basis to review the practice list and decide on any modifications to the list to ensure the rule continues to provide additional clarity to the agriculture community while achieving water quality benefits.

The MOU also clarifies the roles and responsibilities of each agency to ensure that there is a clear distinction between the regulatory and technical assistance responsibilities. NRCS responsibilities outlined in the MOU focus on working with farmers, ranchers, and other land managers to assist with their voluntary efforts to plan

and install conservation practices that meet their needs and objectives. The development, review, and revision of the NRCS conservation practice standards themselves are the sole responsibility of NRCS. Finally, I want to make clear that the IR and the MOU in no way affect the voluntary nature of NRCS work with producers in implementing conservation practices and programs.

#### **Benefits for Agriculture**

The IR signals a new opportunity for recognizing the value of producers' conservation efforts across the nation. We know that voluntary conservation works and that it is delivering benefits for agriculture and natural resources. USDA's Conservation Effects Assessment Project (CEAP) provides ample evidence of the water quality benefits of conservation practices. These scientific assessments are borne out by evidence on the ground. Consider the recent Southwest Farm Press report that highlights:

*"Voluntary conservation practices place **Oklahoma among the water quality elite** for another year. Farmers, ranchers and other landowners have helped remove nine more streams from Oklahoma's 303(d) list of impaired streams."*

The April 3rd IR streamlines the regulatory landscape. For example, landowners who are following NRCS practice standards to implement a stream channel restoration project in North Carolina are able to move forward without going through a notification or permitting process. The benefit—they can move more quickly to restore the channel and deliver intended water quality benefits, and technical staff time is freed up to provide direct technical assistance to other producers.

#### **Conclusion**

Thank you again for this opportunity to discuss the Interpretive Rule, which recognizes the value of agricultural conservation efforts in benefitting water resources and brings additional flexibility for producers. The list of successes will grow as the agencies and producers gain more understanding of the opportunity provided by the IR. There is no sector of the economy that cares more about water than agriculture. America's farm and ranch families make decisions every day that help to protect and ensure our water resources. The IR will make those decisions and actions a little easier and produce a benefit for farms and ranches, their communities, and the nation as a whole. USDA looks forward to continuing to work with EPA and Army to achieve positive outcomes for agriculture, conservation, and the nation's waters.

Mr. Chairman, this concludes my statement. Thank you again for the opportunity to be here today and I will be happy to answer any questions you may have.

The CHAIRMAN. Well, thank you, Mr. Bonnie.

The chair would like to remind Members that they will be recognized for questioning in the order of seniority for Members who were present at the start of the hearing. After that, Members will be recognized in order of their arrival, and I appreciate the Members' understanding. I now take the liberty of recognizing myself for 5 minutes of questioning.

Once again, Mr. Bonnie, thank you for being here today. There is quite a bit of concern and uncertainty among the industry with this issue, and we are hoping to achieve some level of clarity today.

The EPA has issued the Interpretive Rule to clarify that a long list of conservation practices are exempt from dredge-and-fill permit requirements under the Clean Water Act section 404 exemption for normal farming and ranching activities so long as the practices comply with NRCS's standards. So as I understand it, a farmer only qualifies for any one of these exemptions if the farmer follows NRCS's standards. Is that correct?

Mr. BONNIE. That is correct.

The CHAIRMAN. Now, how does that compare to the current law?

Mr. BONNIE. Under current law, there is no presumption that not following those standards is somehow a violation of the Clean Water Act. What we have tried to do is provide clarity that these 56 practices are exempt so that landowners have certainty that

they can move forward with those under the Clean Water Act without having to seek a permit.

The CHAIRMAN. So must a farmer currently meet NRCS standards to qualify for normal activities that are exempt under section 404? Do they have to meet those standards in order to qualify for—

Mr. BONNIE. For this particular—under the Interpretive Rule for this particular—for the Interpretive Rule, yes, they have to meet those standards.

The CHAIRMAN. So we have actually gone from voluntary to compulsory?

Mr. BONNIE. The Interpretive Rule is entirely voluntary. It doesn't require any landowner to undertake any of these activities. If they want to undertake these activities, we have given them an exemption, clarity that there is an exemption for doing that.

The CHAIRMAN. So if we don't want them to experience a world of hurt, then they will have to comply?

Mr. BONNIE. Well, I am not sure I would say that our conservation practices are a world of hurt.

The CHAIRMAN. Well, if they don't want to be facing the consequences of the Clean Water Act and all of its—up to \$37,000 fines a day, the presence on the farm, the interruption of farming activities, interruption of providing affordable, high-quality and safe food for the nation, if they don't want to, it really is compulsory to—what was voluntary is now mandatory.

Mr. BONNIE. I disagree, with all due respect, with the characterization. I think what we have done is provide a menu of activities that they can undertake and have clarity that they won't be in violation of the Act.

The CHAIRMAN. I think that is going to be the topic of today's discussion, so we will get into it more.

I have a little bit of time left. Is it true that any or all of these exemptions can be changed, curtailed or even eliminated by NRCS without written notice to the public or without public input?

Mr. BONNIE. So our plan and the MOU lays this out, to review these exemptions annually with EPA and the Corps. We take this MOU very seriously. We didn't enter into it lightly, and we are going to do the best we can to not only maintain the 56 exemptions that are in there but look for opportunities to add to it.

The CHAIRMAN. So what you are telling me is, you are going to take the complexities of three major players—your agency, the Army Corps of Engineers, the Environmental Protection Agency—and they are going to subject to changing this thing on at least an annual basis. Is there a—can you tell the Committee or submit for the record the process by which the NRCS establishes these standards, what input farmers have in their development and what happens if farmers disagree with NRCS?

Mr. BONNIE. So we have, over the last several years, have heard a lot of input from agriculture on this issue, and one of the things we have heard is about the importance of certainty and looking for ways to expand exemptions. As we met with the EPA and the Corps to discuss the Clean Water Act, that was one of our primary concerns, and in working with those two agencies, we looked at practices that we thought both are practices that can be done in

waters of the United States and that provided water quality benefits.

The CHAIRMAN. Well, I find myself in an unusual situation because I am a fan of NRCS. I was just with a large group of your employees yesterday talking to them. But I find today that in this situation—I think you are sincere when you say you take farmers' interests, because you put boots on the ground. But with this Interpretive Rule, there was no public comment period, to the best of my knowledge, and there wasn't even notice. It went into effect immediately upon its publishing and so somehow we have veered away from the NRCS that I am accustomed to.

My time has expired. We are going to try to stay within the limit so we can give everybody lots of time for questions, and I am pleased to yield to my good friend, the Ranking Member—oh, I am sorry. I am going to yield to the Ranking Member of the full Committee, Mr. Peterson from Minnesota.

Mr. PETERSON. Thank you, Mr. Chairman. I appreciate it. I appreciate your holding this hearing.

Mr. BONNIE, it has been told to me that nothing is going to change here and that we are going to include all of the practices that are currently being done. So apparently under this deal, the practice no. 554 water drainage management is not listed as a practice, it is something that currently is being done. Why was that left off?

Mr. BONNIE. As I responded earlier, we looked at two criteria for these, whether they were water quality benefits and as well if they are done in waters of the United States. We tried to choose practices that did that. Our hope is that we may be able to provide additional practices, going forward.

Mr. PETERSON. But that is going backwards from what we are doing now, how do you say that you are covering everything? It is not true.

And my experience out there, since this has come out, is the Corps of Engineers has gone off the reservation, and there was one meeting where they stood up and said we are going to go from navigable waters to all waters in the Prairie Pothole Region because we are going to restore all the wetlands. One of their people said that. The NRCS has a MOU with the Corps that they are going to follow the NRCS determination.

I have another situation where a guy wants to build a dairy farm, and NRCS is willing to permit it and has a mitigation situation, which he wants to comply with, and the Corps is standing in the way.

So I don't get this that you say that nothing is going to change. In my experience in what is going on out there, that is not the case at all, and are things like dikes and levees on WRP and wetland easement programs, are they subject to section 404 permits? How about tiling? I mean, that is what you are saying, that they will still be subject to section 404—

Mr. BONNIE. Not in the—

Mr. PETERSON.—now we are not doing that?

Mr. BONNIE.—Interpretive Rule but in the proposed rule, there is now an exemption for till drainage related to groundwater.

Mr. PETERSON. There is?

Mr. BONNIE. Yes.

Mr. PETERSON. So what is the difference between the Interpretive Rule and the—

Mr. BONNIE. So the Interpretive Rule interprets normal farming and ranching and provides clarity that these 56 practices don't require a permit under section 404.

Mr. PETERSON. Why were these others left off then? Why were they left off there and put in this other place?

Mr. BONNIE. Well, as I mentioned earlier, we followed two criteria for which exemptions made the list, and with respect to the Corps, as it affects the Interpretive Rule, we are committed to having conversations and have already started that process with the EPA and the Corps to ensure that they understand that there is consistency across the country in how we look at the Interpretive Rule.

Mr. PETERSON. Well, I wouldn't hold my breath because the Corps in Omaha has a whole different perspective than the Corps in St. Paul, and that is something I run into all the time as well. What about the dirt piles that are left after you till? You know, when you till you get a little bit of dirt on the top of the ground. Apparently they are saying that that is requiring a permit, the section 404 permit?

Mr. BONNIE. I don't know the answer to that question. It is probably a more suitable question for EPA or the Corps. We were—in our conversations around the proposed rule itself, again, our emphasis is looking for ways that we could expand some of the exemptions for agriculture.

Mr. PETERSON. Well, it seems to me you have left some of these things off and we need to—the other thing that concerns me is, we had a letter in one situation where out there the Corps is telling people that they can't get to this for 8 to 12 months, and so they are going out there trying to grab more jurisdiction and they can't even do the work they have now and somehow or another I am going to go explain to people that this is better? That dog doesn't hunt, and I just don't see where we are getting with this.

Mr. BONNIE. The commitment I make to you, sir, is that we are going to do our best to make sure there is consistency as it relates to the Interpretive Rule with how the three agencies view it. NRCS is in charge of its own standards. As I noted, no landowner has to go get certification or otherwise check in with any of the three agencies.

Mr. PETERSON. Well, are you going to guarantee me that we are not going to go backwards from all the progress we have made in Minnesota with NRCS working with these other agencies that what is going on here is not going to move us backwards?

Mr. BONNIE. I am going to commit to you that we are going to do our level best to make sure that is the case.

Mr. PETERSON. And that is what seems like is going on now, and that would be a bad outcome.

Thank you. I yield back.

The CHAIRMAN. The gentleman yields back. I now recognize the gentleman from Ohio, Mr. Gibbs, for 5 minutes.

Mr. GIBBS. Thank you, Mr. Chairman. Thank you for holding this important hearing.

Last week in my Subcommittee, Water Resources under Transportation and Infrastructure, we had the Deputy Administrator of the EPA, Robert Perciasepe, and Jo-Ellen Darcy, the Assistant Secretary for the Army Corps, as well as other stakeholders on the panel, and after several rounds of questions and two panels, it is safe to say we didn't get our questions answered, and it is troubling for farmers and ranchers and home builders, everybody. There is a lot of uncertainty out there. Also on the proposed rule, it is clear that no state EPA has come out in support of it.

But the Interpretive Rule we are discussing today that was effective in March is concerning, and I am concerned about how this Interpretive Rule may discourage producers from participating in conservation practices due to a mandatory and expensive permitting process and lack of clarity.

I want to follow up on the Chairman's question a little bit, and as you stated, Mr. Bonnie, if you are doing a conservation practice, one of these 56, and you are in compliance working with NRCS, you are exempt. I am looking through the list here. Is it safe to say that if a farmer/producer goes out and is doing a practice like structure of a water control or building a fence and has not worked with the NRCS or maybe he is just doing it himself, he would not be exempt? Is that true?

Mr. BONNIE. No, they do not have to work with NRCS. As long as they follow the practice standard, they are exempt. There is no required certification from NRCS or any other agency.

Mr. GIBBS. Who is the enforcement mechanism?

Mr. BONNIE. There is no requirement for any landowner to check with any Federal agency. All they have to do is follow the standard.

Mr. GIBBS. Well, my concern is with the proposed underlying rule, the expansion of waters in the United States, EPA could come in and you could say exempt and they could challenge if that farmer is not in compliance with NRCS, so that is going to be—

Mr. BONNIE. It doesn't change any of the—anything as it relates to the proposed rule but what we would argue is that we have provided additional certainty to these 56 practices and the landowner will be better off because of that.

Mr. GIBBS. Well, I guess time will tell, but it is a very concerning issue.

Also, those exemptions, even if you are in compliance with NRCS, only exempts you from section 404 permitting. I have a bill, H.R. 935, Reducing Regulatory Burdens Act of 2013, about NPDES permitting under section 402. My question in there is if a farmer is exempt from doing structure or water control on this 56 exemption list, exempt under section 404, if they expand the waters in the United States, wouldn't they be liable under section 402 for permitting and also be liable for possible lawsuits?

Mr. BONNIE. So this doesn't change anything related to section 402. As you point out, it is only for section 404. The existing exemptions for storm water runoff or irrigation return flow still apply for section 402.

Mr. GIBBS. Especially with the expansion of waters of the United States, because currently under the Clean Water Act, agriculture had a blanket exemption from the sections 402, 404 permits but under the rule if they expand jurisdiction, which you will hear in

the next panel that they are—we heard that last week in my committee—then they would be opened up to more regulatory burden and possible citizens' lawsuits. Would you agree?

Mr. BONNIE. Potentially, yes.

Mr. GIBBS. So that is a real concern.

Also in the rule, in the underlying rule, there is a lot of ambiguity and vagueness, and it seems to me that things are really stacked on the regulatory side. It gives them the flexibility because what I would document as proof, they stated in my committee that they would look at things on a case-by-case basis and gives them the flexibility if they want to enforce this or not enforce this, and I could see the attempt by USDA here to say we are doing these 56 exemptions but I think that there is enough ambiguity in the vagueness in the underlying rule that these exemptions don't maybe go to the root of what you are trying to do. I really have concerns to that, and I think that is an issue that—and I would concur with the Chairman that this rule ought to be laid on the table, the underlying rule, the proposed rule and the Interpretive Rule because I don't think it is helpful. I think we can look forward to having less conservation activities on farms because of fear of doing anything opens up the door to litigation and permitting and delays in getting those permits if they are required to get those permits.

I yield back my time.

The CHAIRMAN. I thank the gentleman and now recognize the Ranking Member for 5 minutes.

Mr. WALZ. I would yield some of my time to the full Committee Ranking Member.

Mr. PETERSON. I thank the gentleman.

I have a list here of the conservation practices from NRCS, and over ½ of them are not listed. The ones circled in red are listed, the others aren't. So I would like to submit this to Mr. Bonnie and have him explain to us why these ones that aren't included, why they weren't included.

[The information referred to is located on p. 103.]

Mr. WALZ. I thank the Ranking Member.

Thank you, Mr. Bonnie. I think what you are hearing is—and again, you have good actors trying to get this right. I can tell you that what is being conveyed by my colleagues is what I am hearing also, that there is great uncertainty, and these are by folks that have lived a lifetime of trying to incorporate conservation practices to the best of their ability while still trying to produce on the land. I think you are hearing this. I hope you are hearing from folks that want to get this right but there is little doubt there is confusion, and we need to get to the heart of why that is.

One of the questions, and it kind of got hit on—and I am certainly in full disclosure, I am biased to Article I of the Constitution that it is our job to do it. I am always curious when an agency goes out and sets a rule how much input did the stakeholders have. Because I am hearing from some of my folks that they felt pretty blind-sided by this. They felt like there wasn't collaboration. Could you kind of explain a little bit to me of what type of outreach was done to get the input of those stakeholders?

Mr. BONNIE. As you know, for the Administration, this is a rule, waters of the United States. There has been earlier draft guidance that was put out. There has been ongoing conversations with USDA and agriculture around this issue broadly as it applies to waters of the United States over the last 5 years. We have had a number of conversations with folks in agriculture about their concerns, and one of the concerns we continued to hear was the need for certainty, the need to broaden exemptions. We viewed the Interpretive Rule as a way to be responsive to those concerns. We have a public comment period right now on the Interpretive Rule that will close in July but that is not going to be the end. We hope we will have an ongoing conversation with agriculture on this to improve its implementation. If there are opportunities to add additional practices, we want to hear that as well.

The other thing we will do is as much outreach as we can, both to agencies and agriculture, to inform them about how the Interpretive Rule is to work.

Mr. WALZ. Did you anticipate there would be this type of, I guess, concern and level of concern? Did it surprise you when you heard this or were you prepared for that?

Mr. BONNIE. Well, on the one hand, I would say it is obviously clear that this issue, waters of the United States, broadly has always been of deep concern to agriculture and forestry as well. We understand that. We understand that doing things around this can be controversial. We do think that what we have done here is increased the number of exemptions through a voluntary basis using conservation practices that are very popular with landowners so that we hope that this will be something that will be accepted as the opportunity that we think it is.

Mr. WALZ. I do worry, and the gentleman from Ohio brought up a great point, that we have to be very careful in doing this so that we don't disincentivize people that want to do this right, because our goal is to get this conservation right. The goal is to—and I want to be clear—regulations that are smart, that clean our waters, that allow for other industries to thrive aren't burdensome. Those are smart. But if they do get to that point of being burdensome or they become a lack of clarity or they become, it is easier not to do it, I think that is a concern. I hear this from folks that I can absolutely tell you, Mr. Under Secretary, are committed to getting this right—feel that confusion.

When I hear this, just as an example, now, how do I go out—and you have heard this from someone—just something as simple as this: someone wants to do fencing. What kind of—what happens there? What changes for them if they were doing fencing 2 years ago and they want to do fencing under this Interpretive Rule? What is different and why would someone, these folks be confused about this?

Mr. BONNIE. Well, the fencing standard by NRCS is pretty short and it is very broad. If a landowner basically builds a fence that is in keeping with that, and I would submit to you that standard, I would submit to you that is going to be a fairly easy standard to meet, they are going to have a clear exemption under the Act. They can either do that themselves by getting the standards off the website, for example. They can reach out to NRCS if they want to

do that. NRCS may be willing to cost-share that action. They can reach out to a technical service provider or others, purely voluntary, don't have to reach out to the Federal Government if they don't want to, any of the agencies. It is just an option, a voluntary option that they can take if they want.

Mr. WALZ. Your interpretation, your understanding and you are telling me for clarity on this, nothing changed for those people? They are not open for any more lawsuits?

Mr. BONNIE. All we have done is provided an additional option for someone that wants to seek some clarity about an exemption under the Act.

Mr. WALZ. Okay. With that, I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman and now recognize the gentleman from Arkansas for 5 minutes.

Mr. CRAWFORD. I thank the Chairman.

I am a little concerned about the 56 practices too, and so I want to also associate myself with the Ranking Member as well.

Also, the other thing that the Chairman mentioned is the relationship the NRCS has had up to this point with farmers. I think it has been certainly consistent in my district as well that the NRCS has been looked at as a source of technical expertise with respect to things like surface water retention and things of this nature. But as my friend from Ohio pointed out in our Subcommittee hearing last week, it seems like the NRCS has been sort of caught up in this issue with the EPA and the Corps of Engineers to become now somewhat of a regulatory body. I never got an answer last week so I will try it with you. One of the interpretations in the Clean Water Act from the Supreme Court is significant nexus. So when we talk about a section 402 permit as an example and somebody has some drift in that waterway then is in contact with a regulated waterway, does that constitute significant nexus and who makes that interpretation?

Mr. BONNIE. I will do the best I can. It is probably a better question for EPA or the Corps. I believe spray drift is not regulated. I believe that if you apply a pesticide directly to a water, that that can be subject to regulation, and I believe if you follow the recommendations of the specific pesticide that you are in compliance with section 402.

Mr. CRAWFORD. My other concern, among others—I have 5 minutes, I could never enumerate the concerns I have about this but I will do my best in the time that I am given. As an example, so we talk about spray drift, some of these things. What about a cattleman? If you have ever been around cattle, they are going to eliminate where they please. So your cow walks into a stock pond that may be draining into a ditch that flows into a regulated waterway and eliminates. Who is going to address that issue? Is the cattleman now subject to a lawsuit?

Mr. BONNIE. Again, probably a better issue for EPA or the Corps but I would say it very much strikes me as a normal farming and ranching activity. I would say that in the Interpretive Rule, we have added a practice for livestock crossing if there are concerns there.

Mr. CRAWFORD. And then this was alluded to, fence building. Obviously—and I go back to my comments about the technical re-

sources available that are provided by NRCS which up to this point have been—particularly in my district, there have been some great projects as a result of interaction and collaboration with NRCS, and we would like to keep it that way. Is the NRCS now going to— their core competency up to this point has never been fence building. But it sounds like now there is going to be a standard set prescribed by the NRCS as an option, and we hear that repeated, but it doesn't sound like we are giving our producers really any options to avoid being caught up in regulatory regime here.

Mr. BONNIE. So we have long had a standard for fences. I would be happy to provide it to your staff. As someone who has grown up on a horse and cow farm, I have been around a lot of fences. I think most producers would meet the standard fairly easily.

With respect to NRCS becoming a regulatory agency, again, there is no requirement that any landowner seek NRCS's certification for any of these practices.

Mr. CRAWFORD. Okay. Let me ask you this, and again, I didn't get this answer from the EPA or the Corps. Who actually makes the determination on significant nexus? Is this something that the three agencies are going to get together and say, "Yes, that is a significant nexus and we are going to go forward and regulate?"

Mr. BONNIE. USDA is not involved in regulation of that aspect of the Clean Water Act or any aspect of the Clean Water Act.

Mr. CRAWFORD. And the other issue I have is if a farmer is not following an NRCS standard, is that by interpretation, does that mean they are in violation of the Clean Water Act? Are they subject to a \$37,500 fine?

Mr. BONNIE. Absolutely not. There is no presumption that not following NRCS practices somehow violates the Clean Water Act.

Mr. CRAWFORD. Well, I appreciate your testimony today, and again, I share the concerns that the Chairman has. I think we have—our producers have enjoyed a very productive relationship with the NRCS up to this point, and my concern is that what has happened now in regards to the Clean Water Act could compromise that relationship and foment distrust among producers with respect to the NRCS, and with that, I yield back.

The CHAIRMAN. I thank the gentleman for yielding back. I just want to point out, in terms of the exchange on the pesticide spraying, I mean, just a little clarification to kind of contrast what you said. The EPA currently regulates pesticide spraying and they have, to the best of my knowledge, two additional restrictions pending that they are considering.

Mr. BONNIE. That is right, and I didn't mean to suggest otherwise if I did.

The CHAIRMAN. Okay. Now I am pleased to recognize the gentleman from North Carolina, Mr. McIntyre, for 5 minutes.

Mr. MCINTYRE. Thank you. Thank you very much, and thank you for being here today.

I have two or three questions I would like to get answered so I will just go right through them. First of all, in North Carolina, several state agencies have standards for many of these activities that differ from the NRCS standards. Will these activities be exempt from section 404 permits only if they adhere to the NRCS standards?

Mr. BONNIE. Yes.

Mr. MCINTYRE. Even though they otherwise meet all the necessary state regulations?

Mr. BONNIE. Yes.

Mr. MCINTYRE. Okay. So this is adding a layer of additional standards now that they are going to have to meet?

Mr. BONNIE. Entirely voluntary.

Mr. MCINTYRE. Then if they are—I guess that raises the question, you did say earlier and you just repeated, they are entirely voluntary. You said earlier no landowner has to get certification. You said earlier this is just meant to provide additional certainty. Yet now you are saying even though they are already meeting the requirements of the state and even though they already have done everything necessary for this section 404, they have to meet these NRCS standards.

Mr. BONNIE. No. If they are meeting the requirements of section 404, then they are fine. The Interpretive Rule doesn't do anything to change the exemptions already existing.

Mr. MCINTYRE. All right. Well, I guess we have an old saying in the South, "If it ain't broke, don't fix it," and if it is entirely voluntary, as you have just said, and no landowner is required to get certification, several of our stakeholders, some of whom are in the audience and that we will be hearing from on the second panel, have asked to withdraw the Interpretive Rule. What would be the consequences then of withdrawing it if it is entirely voluntary?

Mr. BONNIE. Well, in my opening testimony, I talked about a landowner in North Carolina who has utilized this and foregone both the expense and the delay in a permit. We think we can save both time and money through this exemption like we have in that example I used in North Carolina. We think we are providing additional options, voluntary options, for producers if they want to use it, and we think over the long term that will be of great value to agriculture.

Mr. MCINTYRE. Okay. And I respect the fact that that is an opinion because you have said three times there that *we think*. Obviously there are other thoughts that are occurring, and we appreciate you coming to answer our questions. So I would hope that you would think about withdrawing the Interpretive Rule because if it is not adding anything of additional quality and if the requirements can legally otherwise be met, then this is indeed adding another layer that has to be considered. For instance, the Interpretive Rule and the regulations that cover the existing Clean Water Act exemptions for agriculture say that an activity must be part of an established or ongoing practice to qualify as not needing a dredge-and-fill permit. What is meant by *established or ongoing*? And some have suggested activities on a farm that took place in 1977 are not established but those that took place after 1977 are ongoing. Is that correct, and is 1977 a magic date or is there some other specified date?

Mr. BONNIE. I am not aware of the issue related to the year 1977. I think the established and ongoing applies to the normal farming and ranching exemption. I think the most important thing, as I understand it—again, probably a better question for EPA and the Corps—the most important thing is that there not be a change

in the use of a water of the United States, and I think that is the most important piece about this exemption.

Mr. MCINTYRE. Okay. It was in 1977 that Congress amended the Clean Water Act by exempting routine farming, silviculture and ranching activities, 33 U.S. Code 1344. So that is where that date comes from, and that would be again a practical application question of this. So as we consider these concerns, the listing of these additional practices and if they are indeed supposed to provide additional certainty, it sounds clearly from the questions being asked and the concerns being raised today that actually it is providing additional uncertainty. I would encourage, if that is truly the intent of the rule, which you have said it is, is to provide additional certainty, then it needs to be revisited before it is implemented.

And so we appreciate your coming before us today to hear our concerns. We appreciate the hearing. That is the reason for the public input, and if July sounds like it is too soon of a time to implement this, we would ask it be tabled until there can be more certainty.

And with that, I yield back. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman from North Carolina and now recognize the gentleman from Michigan, Mr. Benishek, for 5 minutes.

Mr. BENISHEK. Thank you, Mr. Chairman.

Mr. BONNIE, I am curious as to who you consulted with before putting out this Interpretive Rule because we have a lot of people here that say they weren't consulted. So you said you consulted with people in agriculture. Who exactly was that?

Mr. BONNIE. Let me be clear about what I meant by that. I didn't mean to suggest that we consulted with folks on the specifics related to the Interpretive Rule. We have had ongoing conversations with agriculture for a long time about the Clean Water Act, how it applies to agriculture, and we have had ongoing conversations with folks in agriculture about the need for broadening those exemptions.

Mr. BENISHEK. Who are those people that you consulted with?

Mr. BONNIE. We hear regularly from livestock groups, from other groups that have concerns about the need for further clarity and exemptions in the Clean Water Act.

Mr. BENISHEK. Have any groups here in the audience been consulted about this?

Mr. BONNIE. Well, again, I—

Mr. BENISHEK. Raise your hand.

Mr. BONNIE. Don Parrish and I have had lot of conversations about the Clean Water Act. He would say, as would I, that we never had a conversation about the specifics of the Interpretive Rule.

Mr. BENISHEK. Well, I have another question, the difference between a legislative rule and an interpretive rule. My understanding is that an interpretive rule sort of defines the rule of law. A legislative rule actually makes the law. It seems to me that this Interpretive Rule actually is a legislative rule and that would require a comment period because it actually defines 56 things that weren't previously defined as the law but now it is. So how is this not,

what you call an Interpretive Rule, how is this not a legislative rule, which would require a comment period?

Mr. BONNIE. We do have a comment period. It is up until July. What the Interpretive Rule does, it interprets what normal farming and ranching activities are, and defines that as including conservation practices and particularly the 56 conservation practices that we have laid out.

Mr. BENISHEK. I guess this is not my understanding of what the difference is because my understanding is that the interpretive actually interprets what the law says and then your rule seems to define it, which is the definition of a *legislative rule*, and I don't understand why the comment period wouldn't take place before you do a rule rather than after you do the rule. What is the reason for that?

Mr. BONNIE. We wanted to include conservation in normal farming and ranching activities. We wanted to expand the number of exemptions. Our hope is that we have reflected what we have heard from agriculture and can continue to do that as this goes forward and we hear both concerns and praise about how this thing rolls out.

Mr. BENISHEK. But as I understand it, this comment period is about the underlying rule, not the Interpretive Rule.

Mr. BONNIE. There are two comment periods. The comment period for the proposed Clean Water Act Waters of the U.S. rule is open until October. We have a comment period for the Interpretive Rule open until July 7th.

Mr. BENISHEK. Why is it that we have to be changing this rule every year?

Mr. BONNIE. Well, our hope is that with conversations with EPA and the Corps, that there may be opportunities to add additional practices, look at this Interpretive Rule as it is played out.

Mr. BENISHEK. Isn't that really hard on people that actually have to comply with these rules that they are subject to having it changed every single year?

Mr. BONNIE. Well, what I would say is that I think this is again entirely voluntary. We think we have provided additional options for conservation and for landowners to undertake conservation activities. So we hope that this will be seen as an opportunity for agriculture.

Mr. BENISHEK. I will yield back the remainder of my time.

The CHAIRMAN. I just want to say, Secretary Bonnie, I am starting to lose track of how many times on agriculture questions you are deferring to the Army Corps of Engineers and the EPA, which is a big part of my concern. I trust the USDA when it comes to agricultural practices. And I yield back, and the gentleman yields back.

It is my pleasure to introduce the gentlelady from New Hampshire, Ms. Kuster, for 5 minutes.

Ms. KUSTER. Thank you very much, Mr. Chairman, and thank you, Mr. Bonnie, for appearing before us today. We are bipartisan in our concerns that have been expressed certainly from agricultural producers in New Hampshire and many states across the country.

I agree with the opening comments, that the farmers in my district do care a great deal about the environment and about the land including mitigating runoff from streams and wetlands and ensuring that their animals have access to clean water, *et cetera*. The concerns that you are hearing are related to the level of engagement in the process by the agricultural community, and I share the concerns that have been expressed here on both sides of the aisle that the stakeholders in my district did not feel included in this process. With that being said, I guess the question at this point is, what are the plans that NRCS has moving forward on outreach and education because it may come as a surprise to some people that these are voluntary, given the context of the rule-making that is going forward at the EPA, which nobody interprets that to be voluntary. I mean, there is a great deal of concern, and already this is nothing new to you but we are venturing into a volatile area when the topic is navigable waters and you end up talking about ditches and not even streams. In our region, these are seasonal. There is nothing navigable about these waters. So I just would ask if you could spend some time on how the Department of Agriculture and the NRCS can move forward to educate farmers who are trying to do the right thing but in my district, these are small farms. These are not big corporate farms. They don't have lawyers. They don't have the ability. They don't even have the time to contend with a whole new set of rules.

Mr. BONNIE. So with respect to the Interpretive Rule, we are trying to do the best job we can at educating our own staff that interact with a lot of your producers and others with respect to the Interpretive Rule, so we will do the best job we can there. We are also having conversations with EPA and Army Corps so they understand this as well. We have done other pieces of outreach. For example, we have put a Q&A up on our website that explains what the Interpretive Rule is and what it isn't. We are going to continue to do those efforts, and again emphasize that this is entirely voluntary, that it provides options for landowners if they want to use them and we think can be helpful to them in putting conservation practices into place on their land.

Ms. KUSTER. Might I suggest that we have a built-in process, and I am a new Member of Congress and new to the Agriculture Committee but one of the things that I have been so impressed by is the network of organizations and people all across this country who are very, very involved in—they rely on these organizations to keep them abreast. As I say, they don't have time themselves. Is there any plan for outreach to these organizations, many of them are represented in this room, and if not, could you incorporate that into your planning?

One of the things about government regulation generally and in this particular case, you are familiar with the concept of the Interpretive Rule. I think it is pretty clear that others are not, and frankly, I am an attorney, the idea that this was intended to provide clarity, I can't see that that has been effective. Could you consider reaching out to these organizations to help engage the dialogue, engage the farmers and the producers in the dialogue? I think you would have a much better outcome and frankly a much

better understanding—they would have a better understanding of what your intentions are.

Mr. BONNIE. Absolutely. We will continue to do that.

Ms. KUSTER. Thank you. I will yield back. Thank you.

The CHAIRMAN. I thank the gentlelady. I now recognize the gentleman from Colorado, Mr. Tipton, for 5 minutes.

Mr. TIPTON. Thank you, Mr. Chairman.

Mr. Bonnie, thanks for being here. I would like to follow up a little bit on some of Mr. Benishek's questions. You referenced Don Parrish, who I assume is in the building here today. Has it been your experience that the ag community is coming in and saying regulate us more?

Mr. BONNIE. Of course not.

Mr. TIPTON. Of course not. So when we are talking about actually hearing—this is a classic example of the cart before the horse, putting out an Interpretive Rule to begin with and then we are going to gather comments afterward. Explain to me, help me understand the sense of that.

Mr. BONNIE. As I said before, we have heard for the last several years a lot of comments of concern of the Clean Water Act itself, the need for additional exemptions. In response to that, we believe the Interpretive Rule—

Mr. TIPTON. Additional exemptions, so what people are saying is, we are regulated too much.

Mr. BONNIE. Well, our—

Mr. TIPTON. Is that what you are hearing?

Mr. BONNIE. We are hearing a lot of concerns about the comments of concern from agricultural producers, absolutely, and our response to that was to put together with EPA and the Corps an Interpretive Rule that we think will provide some options there for increased exemptions.

Mr. TIPTON. Can you understand how disconcerting this has to be to our farm and ranch community and other segments of our economy when we are saying, hey, that is probably a better question for the EPA or for the Corps?

Mr. BONNIE. Well, when it comes to the proposed rule itself, I don't want to speak on behalf of the Corps or the EPA. I can provide some insight there, but my job today is to talk to you about the Interpretive Rule and how it can address some of the concerns of agriculture.

Mr. TIPTON. But when that is put together collectively, effectively what we are doing and what we are seeing is not creating certainty but more confusion, more frustration effectively coming out of the Federal Government that says hey, we are here to help, and the shiver runs up the spine of every independent producer that is out there.

Mr. BONNIE. Well, I would say NRCS has a strong record of working with our producers who have developed a lot of trust over the years. We think this provides additional options if producers want to seek out NRCS. As I said before, they don't have to. And so we hope this adds to the tools that producers have to comply with the Clean Water Act.

Mr. TIPTON. Can you give me a little bit of clarity? Because as you were going through your testimony, you were saying that it ap-

plies to established farming areas. What if there is an adjacent field that hasn't been farmed? A farmer/rancher buys that. Does it then apply, different rules apply to that land that they purchased?

Mr. BONNIE. If it is not a water of the United States, they are free to farm and ranch.

Mr. TIPTON. I have to tell you, I don't know what is not going to be applicable to the waters of the United States. You know, this is the biggest water grab in American history coming out of the EPA trying to be able to control water and impacts that that is going to be.

Mr. BONNIE, the USDA has stated that the Interpretive Rule only applies to adjacent neighboring waters, and it has also been said when USDA is able to show a hydrologic underground connection however tenuous, you will regulate those waters, even though they fall outside your stated application of the rule. Can you explain to me how those two statements don't conflict?

Mr. BONNIE. I don't understand the question.

Mr. TIPTON. When you are saying you aren't going to regulate it, there are going to be applicable rules, we had a directive coming out of the Forest Service that is certainly going to be applicable to the farm and ranch community in terms of underground water, but you aren't going to be regulating it, how is this not a conflict?

Mr. BONNIE. Groundwater in the proposed Clean Water Act rule is not regulated. I think it is an exemption that—

Mr. TIPTON. You need to get ahold of the Forest Service. They are just putting out a directive.

Mr. BONNIE. The Forest Service has put out a directive that will clarify and provide some consistency across the way we address groundwater as part of resource management plans, projects and other things. The purpose of that directive is to provide greater consistency across the Forest Service. It doesn't provide any new authorities to regulate groundwater. It is purely about consistency.

Mr. TIPTON. Actually, if you read through that, my interpretation of it and apparently we have all got the freedom to be able to look at this is, farmer-rancher could divert legally out of a stream to be able to fill a stock pond, to be able to irrigate a field, they are going to be in violation.

Mr. BONNIE. Stock ponds are specifically exempt under the Clean Water Act.

Mr. TIPTON. Not if you are looking at that groundwater rule that is going to be—this again, it actually just points to the government coming in. We have added 174,000+ pages of regulations. Four thousand new regs are coming down the pipeline right now. And when you are talking about an annual review coming up, what kind of certainty is that going to give? I think several Members have spoken of that.

Mr. BONNIE. Yes. The purpose of the annual review is to look at the practices, see if there are additional ones that we can add to this and to see how the Interpretive Rule is being carried out.

Mr. TIPTON. My time has expired. Thank you, Mr. Chairman. Thank you, Mr. Bonnie.

The CHAIRMAN. I thank the gentleman. His time has expired. I now recognize the gentlelady from California for 5 minutes.

Mrs. NEGRETE MCLEOD. Thank you, Mr. Chairman. I have no questions.

The CHAIRMAN. The gentlelady yields back. I now recognize the gentlelady from South Dakota, Mrs. Noem, for 5 minutes.

Mrs. NOEM. Thank you, Mr. Chairman, and Mr. Under Secretary, in South Dakota we have had ongoing problems with NRCS with inconsistent policy from county to county, a backlog of problems, some producers waiting months, if not years, for determinations, so it hasn't always been a good experience. Some counties are very good; some are not. And these determinations impact how a producer is able to participate in programs, and you say you want producers to participate in programs because it is better for our water quality and conservation practices but NRCS is making it very difficult for producers to participate. Now while they are working to address this backlog of determinations, what issues surrounding wetland determinations need to be resolved to provide producers with certainty so that they can farm without being worried about being out of compliance?

Mr. BONNIE. We do have a backlog on wetland determinations, not only in your state but in the Upper Great Plains. We have reduced the backlog. We have put additional resources. We announced earlier this year even additional resources on top of what we have already put there to reduce the backlog. We are also working to improve consistency across the wetland determinations because, as you point out, there has been some inconsistency.

Mrs. NOEM. Also, I have a question. If the Army Corps of Engineers comes to you and asks if a private landowner's practice is in compliance or out of compliance with NRCS standards or someone calls the NRCS and tells them someone is not following the standards, will NRCS have to look into it?

Mr. BONNIE. We have no regulatory requirements or responsibilities under the Clean Water Act.

Mrs. NOEM. You have absolutely no requirement if somebody comes to you and says a producer is out of determination, including the Army Corps of Engineers, to look into it or to——

Mr. BONNIE. No, and as I understand, in the farm bill, there are requirements that we respect landowners' privacy in terms of what they are doing on the ground. So——

Mrs. NOEM. Who would look into that situation?

Mr. BONNIE. Well, the Interpretive Rule doesn't change anything about the——

Mrs. NOEM. You are not quite sure if somebody is concerned or the Army Corps of Engineers wants a determination? You won't provide it and you don't know who will?

Mr. BONNIE. No, we provide compliance determinations related to wetlands, yes, but that——

Mrs. NOEM. The Army Corps of Engineers——

Mr. BONNIE.—relates to our USDA programs, not to the Clean Water Act.

Mrs. NOEM. Which adds to the backlog and the workload that you have to deal with.

Mr. BONNIE. We do have a backlog and, as I said, we are working to reduce it.

Mrs. NOEM. Well, under this proposed Interpretive Rule, some activities are exempt if they follow NRCS standards. So do the standards ever change?

Mr. BONNIE. Every 5 years we review standards on a rolling basis for all our conservation practices.

Mrs. NOEM. So it looks to me that in 2015, do you know how many of those exemptions are up for review?

Mr. BONNIE. I don't.

Mrs. NOEM. It looks like about 30 of them, to me, are up for review, and potentially we could see farmers who are in compliance today but in 2015 if NRCS decides to update them, they could be out of compliance. Is that correct?

Mr. BONNIE. I don't believe that will be the case because these conservation practices, the Clean Water Act, the exemption is from dredge and fill, so the concern is when the practices are being put in place. So I believe the practices being put in place, I don't think there will be a problem here.

Mrs. NOEM. So they are grandfathered if they have done the practice prior to 2015? It is when somebody does a new project in 2015 and forward is when the new standard is going to apply?

Mr. BONNIE. Yes.

Mrs. NOEM. Okay. And the producers will be notified of those changes and that will therefore because we have 30 of these 56 exemptions, going forward, you believe that will provide them with more certainty?

Mr. BONNIE. We hope it will.

Mrs. NOEM. Okay. Well, if this rule provides that kind of certainty for the agriculture industry, I am baffled because none of the agriculture industry wants this. Nobody is in favor of it. So that is what I am struggling with today is that you are here and you are telling us this is necessary, that it is needed for certainty, for confidence of these practices, yet nobody in agriculture wants this. How do you reconcile that?

Mr. BONNIE. As I said before, we have tried to be responsive to concerns related to the broader Clean Water Act as part of this. We think we have provided additional certainty as it relates to these 56 practices. Our expectation over time is that producers will see that as they utilize this and that they will see this as an opportunity. Again, it is entirely voluntary.

Mrs. NOEM. Yes, you have been saying that over and over but thing is, is that if we want people to participate in conservation programs and we want them to do activities on their land that improves our water quality, then we want to make it easy for them to participate and we want to make it so that they want to be involved and they can see the improvements on their land and we don't want them to have to worry about falling out of compliance all the time, and that is the thing that is making this so difficult to reconcile. Obviously the agriculture industry has weighed in here and said this makes it much more difficult. They are very concerned about it, and yet we have no comment period and the NRCS is steamrolling ahead, and I firmly believe that this activity should be rethought by your agency, your department and get into consultation with the agriculture industry.

With that, I will yield back, Mr. Chairman.

The CHAIRMAN. The gentlelady yields back.

Just one point of clarification on a question that the gentlelady had asked. The grandfathering until 2015, is that grandfathering before 2015? Is that in the EPA and the Army Corps of Engineers proposed plan?

Mr. BONNIE. No, I am not suggesting—the point I was trying to make is most of these practices, the exemption against dredge and fill is against dredge and fill, and so a lot of the concern is when you put the practice in place, so my suggestion is that I think when these practices are put in place, that is when the exemption is most pertinent to the producer. So I am not sure that the fact that the practices will change over time will have a significant impact on producers.

The CHAIRMAN. So this grandfathering may be okay with NRCS but we don't know about—we actually don't know whether the grandfathering is recognized under the proposed rule that EPA and Corps of Engineers has.

Mr. BONNIE. Well, again, I don't want to introduce—I am not suggesting that there is grandfathering. What I am suggesting is the way this plays out on the landscape, I don't think this will be a substantial problem.

The CHAIRMAN. I do too. I am pleased to recognize the gentleman from Minnesota, Mr. Nolan, for 5 minutes.

Mr. NOLAN. Thank you, Mr. Chairman. I want to thank Chairman Thompson and Ranking Member Walz for conducting this hearing, and Mr. Bonnie, thank you for being here. I am not going to take much time.

I do want to associate myself with the remarks of my colleagues here with regard to the need for clarity, and we appreciate the fact that you are at least attempting to do that but the concerns that have been expressed here for agricultural producers with regard to the Army Corps and their inability to review permits in a timely manner. That is a serious matter, the uncertainty that exists out there, the need for more outreach and for more accurate information here.

I particularly want to associate myself with the comments from the gentlewoman from South Dakota, Mrs. Noem, when she says that we are all greatly concerned about conservation, and whatever it is we do, we want to encourage more conservation. So there is no one here in my judgment that is against that. On the contrary, we are very much for that.

So with that in mind, I do want to just ask one question with regard to that, and that is this: if fewer people fish because the small streams are polluted and if fewer people hunt because the wetlands have been drained, then would you expect that economic activities associated with hunting and fishing would be greatly diminished?

Mr. BONNIE. Absolutely. Outdoor recreation is an enormous driver of the economy, so clean water is critical to that.

Mr. NOLAN. Well, thank you. I think from time to time we need to remind ourselves what the purpose is here, but that doesn't in any way diminish the need for clarity and certainty and a process that is expeditious and encourages rather than discourages.

And then just one last question. When are you projecting that the final rules will be determined and implemented?

Mr. BONNIE. So the Interpretive Rule is being implemented right now. The interpretation was good when it came out. In terms of the EPA proposed waters of the United States rule, I believe the comment period runs through October.

Mr. NOLAN. But then when would you expect implemented?

Mr. BONNIE. So implementation of the Interpretive Rule is going on right now. In terms of the proposed Clean Water Act rule, certainly towards the end of the year at the earliest but I don't claim to be an expert on when that rule will be finalized.

Mr. NOLAN. Later this year or early next year?

Mr. BONNIE. I believe that is correct.

Mr. NOLAN. Okay. Thank you.

Thank you, Mr. Chairman. I yield back the balance of my time.

The CHAIRMAN. Does the gentleman yield?

Mr. NOLAN. Sure.

The CHAIRMAN. I appreciate it.

Mr. Bonnie, first of all, there was an exchange. I think it was with our full Committee Ranking Member about how fencing was now going to have to be permitted, but in your words, it was going to be fairly simple. I have some of the regulations, the diagrams, the complexities of it, and it is all different by fence type, so we may disagree on the definition of the word *simple*.

Mr. BONNIE. I have the fencing standard here, which I am happy to give to staff as well.

The CHAIRMAN. Yes. Excellent. Well, we have it in hand here, and it is different by each state, and it speaks to the—I am not sure when it comes to regulations if there is anything that is really simple.

We have had a lot of discussion about how you talked about this is normal farming practices, but then in the same breath you keep talking about additional exemptions. Well, if it is normal farming practices, it is counterintuitive to say that you are going to be granting somehow in the future additional exemptions. It is either normal farming practices or it is not, and the whole thing of opening this up on a regular basis with NRCS, the Corps of Engineers, the EPA allowing for revision—and I know you have alluded to it is going to increase flexibility but it also equally opens it up to additional restrictions and more layers and layers of regulations in the future, as you know, is that true?

Mr. BONNIE. NRCS's goal remains to put conservation on the ground with producers in partnership with producers. We think this will help us do that, and as we look—

The CHAIRMAN. If that was the case for a greater flexibility and promoting conservation, why is that not in the regulation? Why is that not specifically laid out to just take away the possibility that this will be a mechanism by which the Corps or the EPA or USDA would make farming almost impossible to do in the future?

Mr. BONNIE. Well, so EPA has already—the Clean Water Act already has upland conservation practices that are exempt from the Clean Water Act section 404. What this does is add additional practices, clarifies through this Interpretive Rule that these 56

practices are exempt. So again, we think we have provided additional certainty.

The CHAIRMAN. Would you disagree, though, the way it is written, it also opens it up that the EPA, the Corps of Engineers or USDA that work together at least annually, at least once a year, it opens it up for more burdensome over-regulation in the future?

Mr. BONNIE. I guess I would disagree with the characterization because this is voluntary. It doesn't require oversight by NRCS, EPA or the Corps and makes no presumption that something isn't on the list that is necessarily a violation.

The CHAIRMAN. The presumption precludes any of those 56 to be taken away, correct?

Mr. BONNIE. No. I mean, it is possible that some of those 56 could be taken away in the future. Again, as I said earlier, we entered into this MOU lightly. We think that there are opportunities to additional practices there.

The CHAIRMAN. Well, I would obviously encourage you to enter into this with more due diligence, not lightly, and I apologize for violating my own rules. Whoops. I now recognize Mr. Ribble for 5 minutes.

Mr. RIBBLE. Thank you, Mr. Chairman. I have a whole list of questions but actually I am going to divert a little bit, and the question I really want to ask you is, what are the takeaways that you have as a result of this hearing and what specific action items will that translate to when you leave here?

Mr. BONNIE. Well, clearly we need to continue to focus on outreach both within our own agency, with the other agencies to make sure that this is applied consistently and we continue to do outreach with the agricultural community to explain what this is.

Mr. RIBBLE. So basically your takeaway is, you have a communication problem?

Mr. BONNIE. Yes, we can do a better job of communicating. I think we continue to believe that this creates opportunities for agriculture to put conservation on the ground.

Mr. RIBBLE. I would say with all due respect, Mr. Bonnie, that it is more of a confusion problem than a communication problem, and you mentioned a couple times that the standards are currently voluntary, but in your view, doesn't including them as specific exemptions from the Clean Water Act convert those practices from voluntary to regulatory?

Mr. BONNIE. I don't believe that is the case. This is entirely voluntary. No producer has to use any of these exemptions.

Mr. RIBBLE. Okay. In that case, which agency will be responsible for inspecting farms that claim conservation exemptions under this Interpretive Rule?

Mr. BONNIE. There is no requirement that there be any inspection that takes place.

Mr. RIBBLE. I yield back, Mr. Chairman.

The CHAIRMAN. The gentleman yields back. I now recognize Mr. Schrader for 5 minutes.

Mr. SCHRADER. Thank you, Mr. Chairman.

With all due respect, Mr. Bonnie, this is a nightmare. It is probably one of the worst, egregious examples of government overreach I have ever seen in my lifetime. I have been involved in public

service for way too many years, I guess, but the fact that NRCS has joined in this illicit grabbing of private property with EPA and the Corps just doesn't become an agency that I have had a lot of respect for in the past. I am very disappointed.

What was wrong with the 100+ conservation practices you had on your list? Now there are only 56. What was wrong with those? What were you doing wrong and hurting our environment?

Mr. BONNIE. We weren't doing anything wrong.

Mr. SCHRADER. So why are those not all on this list?

Mr. BONNIE. Because there are two things that we looked at. One was, was it a practice that could be done in waters of the United States. There are—

Mr. SCHRADER. The agency is the only determiner of what is an acceptable practice. Do you know the exact correct fencing standards are going to protect that stream and there is no other fencing practice that could possibly help that stream?

Mr. BONNIE. No, we wouldn't presume that.

Mr. SCHRADER. Then why are you dictating in these regulations specific guidelines for fencing? I am on the Small Business Committee. We had a hearing. We had a cattleman come in doing the right thing. The stream is in much better shape because he did some fencing, kept the cattle out. That fencing would not meet your standard. I mean, it seems to me it is crystal clear that you are trying to establish regulatory guidelines, standards by which a person farms and you have no business doing so.

Mr. BONNIE. I don't believe we are trying to do that.

Mr. SCHRADER. That is exactly what you are doing. There are only 56 ways. I see it. I am reading it right here, man. There are only 56 ways you can do things.

Mr. BONNIE. It is voluntary.

Mr. SCHRADER. And it is not voluntary. You keep saying that. That is wrong. There is nothing voluntary about getting your butt sued because you didn't do one of these 56 practices. That is what is going to happen.

Mr. BONNIE. There is no presumption that not doing these practices—

Mr. SCHRADER. You need to get out of Washington, D.C., and get back on the ground. There are farmers and ranchers across this country that do not want to have this rule in any way, shape or form. Did you or did you not have a public hearing and comment period before the Interpretive Rule?

Mr. BONNIE. No, we did not.

Mr. SCHRADER. No, you did not. Any God-fearing environmentalist would have your head. Heck, they would be living in trees around your house, for God's sake, for not having that. How can you possibly defend what you are doing here? The Supreme Court clearly says, clearly says, clearly says, United States, okay, waters of the United States must refer to relatively permanent, standing or flowing bodies of water, not occasional, not intermittent, not ephemeral flows, and your hydrologic connection is not sufficient.

Mr. BONNIE. I think you are referring to—

Mr. SCHRADER. Other waters—you have a whole rule on other waters here. Why is a ditch—

Mr. BONNIE. It is not our rule. You are referring to the proposed Clean Water Act waters of the United States rule. That is not our rule.

Mr. SCHRADER. It is part of what is coming down the pike beyond this egregious Interpretive Rule that you already have. How can you justify even relating to that when the Supreme Court case says specifically those waters should not be part of this discussion?

Mr. BONNIE. Well, again, the waters of the United States rule is not USDA's rule, it is EPA and the Army Corps. What we have done here has created—

Mr. SCHRADER. Do you agree that the other waters, as an NRCS person, do you agree that other waters should be involved in this Clean Water Act interpretation, going forward?

Mr. BONNIE. I think other waters is part of the statute, as I understand it.

Mr. SCHRADER. No, it isn't. That is the whole point. The Supreme Court has specifically said you are not supposed to be dealing with this. I hope you communicate that to our friends in the EPA and our friends in the Corps.

Mr. BONNIE. One of the things we have encouraged is increase some of the exemptions under the current rule and into the proposed rule.

Mr. SCHRADER. Mr. Chairman, all I have to say is, I have made my point clear that NRCS unfortunately is giving up its jurisdiction. It is starting to prescribe what men and women can and can't do on their own property way beyond what protects the health, safety and welfare of the navigable rivers related to navigable rivers, waters of our great country, and it is a shame that people have the hubris in this community to think that they can dictate to farmers and ranchers that live, sweat, take care of the steward where there are stewards of the land out there, specific practices. It should be about outcomes. It should be about outcomes, Mr. Bonnie. You are missing the point here entirely. It is not about prescribing what men and women can't do or can do on their own private property, and I yield back.

The CHAIRMAN. I thank the gentleman. I am going to yield to the Ranking Member for a point of clarification.

Mr. WALZ. Mr. Bonnie, I just—and I am trying to get this, and you are hearing the frustration. I am hearing from you. I am trying to clarify this, and I really think people are trying to get this right. Tell me this, if I frame it like this, prior to the Interpretive Rule if a farmer carried out a practice that is now listed in the rule, did that farmer have to get a section 404 permit? And if they did, isn't the purpose of the Interpretive Rule now so they don't have to? Is that what you are saying?

Mr. BONNIE. In some cases, there will be practices where there will be a requirement for a section 404 permit. In other cases—

Mr. WALZ. How often did that happen?

Mr. BONNIE. I don't know.

Mr. WALZ. But that is your point, so at the heart of this, what you are saying, if this were interpreted the way you are seeing it and the way the Interpretive Rule is and the questions that were valid that there should have been input and all that aside, if this

is working as you would like to see them work the best, this is what it should alleviate?

Mr. BONNIE. We hope we will reduce the permitting burden and we expect we will.

Mr. WALZ. Okay. Thank you. I yield back.

The CHAIRMAN. I thank the gentleman.

I would like to seek unanimous consent to enter into the record a number of things that we have referenced today, two things and one thing that has not been referenced. One is the NRCS 382A, the fence or standard water, the conservation practice job sheet, with all the specifications, it will be subject to permitting. A copy of a letter entered into the record from essentially the Iowa agriculture community, and from multiple stakeholders in the State of Iowa expressing their concerns regarding the Clean Water Act jurisdiction and NRCS technical standards. This is a letter dated June 18, 2014, to Secretary Vilsack. I request unanimous consent to enter that into the record. And finally, the document that the full Committee Ranking Member made reference to, which is the USDA list of conservation practices, and this document has been amended with noting the ones that are now exempt but leaves a significant number of practices that are identified by USDA and NRCS as conservation practices which will now not be—which are not exempt. So without objection, those are so entered.

[The documents referred to are located on p. 87.]

The CHAIRMAN. I also have a copy that the Ranking Member had asked me to share with you, Mr. Bonnie, and we will make sure you get that before you leave, and I want to thank you for your testimony. I would encourage you if at all possible, because we have not had a lot of communications and input on this beforehand, staying around for the second panel. I think it would be very enlightening for USDA and would certainly encourage you and hope that you will be able to do that, and with that, you are excused. I appreciate your being here.

Mr. BONNIE. Thank you for your time today.

The CHAIRMAN. Thank you.

We will now take some time to—I want to welcome our second panel of witnesses to the table, and let us go ahead and get started with that process.

While we are finishing getting organized here, I would like to welcome our second panel of witnesses to the table: Mr. Don Parrish, Senior Director, Regulatory Relations, with the American Farm Bureau Federation; Mr. Andy Fabin, Producer, Fabin Bros. Farms, Indiana, Pennsylvania, who is here on behalf of the National Cattleman's Beef Association; Mr. Chip Bowling, First Vice President, National Corn Growers Association with a large operation just south of the capital city in Newburg, Maryland; and Mr. Scott Kovarovich—how did I do? Excellent. It is a good day. I really do not like to mess up people's names. There is only one thing that you come in and out of this world with, and it is your name, and we all deserve to get it accurate. So thank you, sir. He is Executive Director of the Izaak Walton League of America out of Gaithersburg, Maryland.

I want to thank the witnesses, and we will proceed here. Before you, as you see, we have the light system. We try to adhere as

much as possible. You don't need to stop cold turkey on red but if you would finish whatever thought you are in the middle of, bring that to a proper conclusion so we can get around to hear all the testimony that each of you brings today and that we value so much and have an opportunity for dialogue with the questions we have here

So Mr. Parrish, with that, I recognize you for 5 minutes.

**STATEMENT OF DON PARRISH, SENIOR DIRECTOR,  
REGULATORY RELATIONS, AMERICAN FARM BUREAU  
FEDERATION, WASHINGTON, D.C.**

Mr. PARRISH. Thank you, Mr. Chairman. Thank you, Members of the Committee, for holding this hearing today. I am Don Parrish. I am the Senior Director of Regulatory Affairs for the American Farm Bureau Federation.

I have been dealing with the Clean Water Act for over 20 years. My wife says I talk about it in my sleep. I am here to share my perspective on the Interpretive Rule.

I would like to begin my testimony, though, with a little bit of an overview of the Clean Water Act regulatory proposal. This map that is in front of you corresponds with the current *Code of Federal Regulations*. Now, what you see on this map is 47 miles of permanent streams, 96 miles of intermittent streams. Those are the dotted blue lines. The gray lines are roads. The roads try to avoid those waters. What is interesting about this is that this is the current approximation of current jurisdiction. Go to the *Code of Federal Regulations* if you disagree. Look at it. It deserves your examination.

What I want to express to you is that this is the limit of current jurisdiction. This is not all the waters that are in this watershed. This is 48 square miles, roughly 30,000 acres, so it is not that big a map. But note that any waters beyond this in this map happens to be of an area in Kentucky is regulated by the State of Kentucky.

EPA in the next slide is changing three definitions: the term *tributary*, the term *adjacent water*, and the term *other waters*. This is what the jurisdictional reach looks like after those changes in definition.

This map turns blue. EPA will control virtually all land use on this 30,000 acres. Those little blue lines, this is what they look like. This may look like a stream but this is a heavy rainfall running across the cornfield, and this land that is under this storm water is going to be a water of the United States regardless of whether that water is there or not because it contains a bed, bank and ordinary high-water mark.

Let me turn my attention to the Interpretive Rule. The Interpretive Rule establishes binding and enforceable requirements for farmers. Currently, NRCS technical standards, NRCS technical assistance and NRCS cost-share programs are, as Mr. Bonnie says, voluntary, but the Interpretive Rule changes that.

For 37 years, farmers could conduct normal agricultural practices on the land but now practices are only going to be exempt if you follow NRCS's conservation practices. And with regard to who is going to referee this issue, going forward, "even where NRCS does not provide technical assistance, the agency plays an important

role in responding to these issues that arise regarding project-specific conformance with conservation practice standards,” and they are going to have citizen litigation looking over their shoulder to do it.

The Corps of Engineers and EPA are also assuming a role that the law does not give them, neither the farm bill nor the Clean Water Act, to adjust these standards. Farmers deserve better. They deserve direct, they deserve clear understanding because the Clean Water Act is a strict liability statute and that carries criminal and civil penalties. NRCS standards are complicated. They are far too complicated for strict liability under the Clean Water Act.

I will leave you with three takeaways. Agencies have confused you, they have confused the media and they have confused farmers. This IR provides farmers with nothing they didn’t already have.

Second, in Iowa right now, 67 percent of all grass waterways and 50 percent of all the terraces are funded out of the farmer’s pocket with no USDA or EPA or Corps of Engineers or NRCS funding. That conservation is going to be under now a cloud of suspicion. It is under a cloud that is probably going to be result in that conservation being halted.

And third, and this picture bears it out, normal farming exemptions are for activities. It does not exclude the land that is under this storm water from being called a water of the United States in the future, and that type of proposal, it invites litigation and it is going to invite EPA right into the middle of how we farm into the future.

There is only one solution. They have to withdraw it, and they have to make darn sure that farmers don’t have to comply with NRCS standards to be compliant with the Clean Water Act normal farming practices.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Parrish follows:]

PREPARED STATEMENT OF DON PARRISH, SENIOR DIRECTOR, REGULATORY RELATIONS,  
AMERICAN FARM BUREAU FEDERATION, WASHINGTON, D.C.

Thank you, Mr. Chairman and Members of the Subcommittee, for holding today’s hearing and for inviting me to testify. I am Don Parrish, senior director of regulatory affairs for the American Farm Bureau Federation (AFBF). I have been employed at AFBF for more than 20 years, for much of the time focused on issues related to the Clean Water Act, including the issues involved in the interpretative rule which is the subject of today’s hearing. I am pleased to share my perspective on that rule and its potential impact on agricultural producers and I would like to underscore that the views I express are my own.

The proposal that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers published in the *Federal Register* on April 21 ostensibly seeks to “clarify” the authority of these two agencies to regulate “navigable waters” which are defined in the Clean Water Act as the “waters of the United States.” The proposal has broad implications for many sectors of the economy, and in particular for agriculture. Just last week, the President of the American Farm Bureau Federation, Bob Stallman, testified before the Water Resources Committee of the House Transportation and Infrastructure Committee on the impact this rule would have on growers. I have attached a copy of Mr. Stallman’s testimony to this statement and would like to request that it be included in the record of this hearing.

The rule proposed by the agencies would affect all Clean Water Act programs. This assertion of authority is critically important, and while it goes beyond the subject of today’s hearing, I would strongly encourage the Members to examine its potential impact on all these programs.

My testimony today, however, will focus on the *Interpretive Rule Regarding the Applicability of Clean Water Act section 404(f)(1)(A) (IR)* and the *Memorandum of*

*Understanding (MOU) among EPA, the Corps and USDA.* With respect to these matters, I would like to make two initial observations:

- The interpretative rule is not a proposal: it became effective immediately upon publication in the *Federal Register*, without advance public notice and comment, and it establishes binding and enforceable requirements for farmers. For these reasons, the IR, in the view of many legal experts, is unlawful.
- By this action, EPA and the Corps have effectively limited Congressionally authorized exemptions that have been in place for 37 years. They have done this in several ways:
  - First, for the listed practices, the IR explicitly limits the exemption to circumstances where the farmer or rancher has complied with what are otherwise voluntary conservation standards. Even “landowners not relying on NRCS for technical assistance have the responsibility to ensure the implementation of the conservation practices is in accordance with the applicable NRCS conservation practice standard. It is important to emphasize that practices are exempt only where they meet conservation practice standards.”
  - Second, for practices that *are* not listed and that also are not specifically listed in the statute (for example, practice #378 ponds, #600 terraces and #635 vegetative treatment areas), the IR creates a new cloud of doubt about the exempt status of those activities. If clarification was required as to the exempt status of these practices, one must wonder why the agencies chose not to clarify the exempt status of other practices. In addition, since the IR and the listed practices could be changed by the agencies any time, farmers and ranchers have no assurances that the list of 56 practices will not be further curtailed in the future.
  - Third, the agencies have given NRCS an unprecedented role in Clean Water Act enforcement: “where NRCS is not providing technical assistance, the landowner has the responsibility to ensure that implementation of the conservation practice is in accordance with the applicable NRCS conservation practice standard. Even where NRCS is not providing technical assistance, the agency plays an important role in helping to respond to issues that may arise regarding project specific conformance with conservation practice standards.” There is nothing in the law granting NRCS this authority.
  - Fourth, NRCS has allowed the Corps and the EPA an unprecedented role in identifying, reviewing and updating NRCS agricultural conservation practices and activities. Nothing in the law justifies that role.

These actions by the agencies create tremendous uncertainty and risk for farmers and ranchers—especially in light of the proposed rule’s broad expansion of “navigable waters.” Congress provided broad statutory exemptions for normal farming, silviculture and ranching activities. However, Congress also limited those exemptions, so that even “normal” farming, silvicultural and ranching activities require a Clean Water Act section 404 permit if the activity may impair the flow or circulation of navigable waters or reduce the reach of navigable waters.

The proposed rule would categorically regulate as “navigable waters” countless ephemeral drains, low spots, ditches and other features across the countryside—features that are wet only when it rains and features that may be miles from the nearest truly “navigable” water. These features intersect and crisscross the land that farmers and ranchers use to grow food, fiber and fuel. If the proposed rule is finalized, even otherwise exempt activities such as plowing or discing—or the 56 listed practices—will require a section 404 permit if the “flow or circulation” of these ephemeral features “may be impaired” or the reach of these features may be reduced.

I have attached comments on the Interpretive Rule and request that they be included as part of the hearing record.

Let me, however, lay out concerns that are broadly felt in the agricultural community:

1. Farmers and ranchers as well as the public deserve direct and clear communications from the agencies on highly technical and complex regulatory issues. The Clean Water Act is a strict liability statute that can carry significant criminal and civil liabilities and can bring with it citizen lawsuits by activist organizations.
2. The IR and MOU are insufficient notice to farmers and ranchers of an enforceable change to the Congressionally authorized exemptions for “normal” agricultural practices. It is clear from the IR, MOU and fact sheets that the legal

obligations to comply with the IR fall squarely on farmers and ranchers and not the agencies.

3. Even if farmers and ranchers are able to comply with the complicated NRCS practice standards, such compliance does not insulate their land from any section 402 permitting requirements or other regulatory impacts resulting from the agencies' proposed broadened definition of "waters of the United States." In other words, while "normal farming exemptions" exempt certain agricultural activities it does not exempt or exclude any newly defined water from CWA jurisdiction.

4. The agencies have confused policymakers, the media, and farmers and ranchers by claiming that the IR provides additional exemptions when it actually narrows the "normal" farming and ranching exemption by imposing otherwise voluntary technical standards and burdensome new requirements for farmers and ranchers.

5. The agencies' decision to accept comments only after the IR is fully effective and enforceable precludes any meaningful public participation and is clearly in conflict with the Administrative Procedure Act (APA).

6. The IR does not provide farmers and ranchers with additional permit exemptions beyond what has already been authorized by Congress. Congress amended the CWA in 1977 to exempt "normal" farming, ranching and silviculture activities from section 404 "dredge and fill" permit requirements.

7. Despite the agencies' characterization, the IR is a legislative rule and is thus inconsistent with the APA.

#### **The Interpretive Rule is a Legislative Rule that is Subject to APA Requirements**

AFBF does not agree with the agencies' characterization of the 404(f)(1)(A) IR as "interpretive." Despite the agencies' characterization, the IR is a legislative rule. The APA draws a distinction between legislative rules, which are subject to notice and comment requirements, and interpretive rules or IRs, which are not subject to such requirements. 5 U.S.C. § 553(b)(3)(A). Interpretive rules merely interpret existing law and policies; legislative rules establish new policies that an agency treats as binding. Actions that are binding must comply with the APA, regardless of how they are labeled.

The IR is a regulation that must be promulgated under the APA because the IR clearly binds farmers and ranchers with new, specific legal obligations under the Clean Water Act. The IR modifies existing regulations interpreting the statutory term "normal farming, ranching and silviculture." 40 CFR § 232.3(c)(1)(ii)(A); 33 CFR § 323.4(a)(1)(ii). The IR purports to continue existing statutory and regulatory exemptions, but instead the IR narrows the 404(f)(1)(A) exemption by identifying 56 activities that will be exempt only if they are conducted consistent with NRCS conservation practice standards and as part of an established (*i.e.*, ongoing) farming operation. Under the IR, previously voluntary NRCS conservation standards are made fully enforceable as part of the CWA regulatory program. The legal obligations to comply with the IR fall squarely on farmers and ranchers and not the agencies.

If a farmer operating an "established" farming operation conducts a farming activity or conservation practice that results in a discharge of dredge or fill material into a water of the U.S., the IR clearly states that the activity "must be implemented in conformance with NRCS technical standards." Failure to comply with the standards results in an unlawful discharge in violation of the CWA. This could subject the farmer to CWA penalties. Therefore this so-called interpretive rule is a legislative rule that imposes binding legal obligations on farmers and ranchers.

#### **Contrary to the Agencies' Statements, the IR Does Not Provide Additional Exemptions for Farmers and Ranchers**

Contrary to the agencies' statements, the IR does not provide any additional exemption for farmers and ranchers beyond what Congress authorized. In fact, as a matter of separation of powers, Members of Congress should be skeptical that the agency even has the authority to provide additional or expanded exemptions. Since the publication of the IR, agency officials and agency websites have claimed that there is no change to the existing CWA section 404(f)(1) exemption for "normal" agricultural activities on "established" operations and that somehow the IR is providing additional protections for agriculture. See Op-Ed on agriculture by Administrator McCarthy, March 25, 2014 ("But it doesn't stop there—[the rule] does more for farmers by actually expanding those exemptions.") However, the IR does not provide farmers and ranchers with additional permit exemptions beyond what has already been authorized by Congress. Congress amended the CWA in 1977 to exempt

“normal” farming, ranching and silviculture activities from section 404 “dredge and fill” permit requirements. 33 U.S.C. § 1344(f)(1). Contrary to the agencies’ assertions, the IR has effectively narrowed, rather than expanded the current exemptions, and NRCS conservation standards that were previously voluntary are now fully enforceable as part of the CWA regulatory program. As the MOU notes, “[d]ischarges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards.” MOU at 3. Thus, the agencies’ public statements about the IR are not only misleading but contradict the actual language of the IR documents.

#### **The IR Applies only to the Section 404 Program**

It appears that the agencies are overstating the significance of the “normal” farming exemption, which does not apply to discharges regulated under the CWA National Pollutant Discharge Elimination System (NPDES) program. Even if the IR would somehow benefit some farmers or ranchers, it cannot insulate any farm or ranch from any section 402 NPDES permitting requirements that may now result from the expansive definition of “waters of the United States” under the agencies’ proposed rule to redefine the scope of jurisdiction under the CWA. The exemption is simply inapplicable to that separate permitting program. Thus, while a farmer may be able to plant cover crops in jurisdictional waters under the IR without a 404 permit (assuming compliance with NRCS standards), that same farmer would face CWA liability for applying fertilizer or pesticide to those same fields without a section 402 NPDES permit.

#### **The IR will Result in More Time-Intensive and More Costly Requirements for Farmers and Ranchers**

Before the IR, farmers and ranchers did not need to satisfy federally mandated practice standards for “normal” agricultural activities subject to CWA section 404(f)(1)(A) exemptions. Farmers could engage in ordinary farming activities without the need for a section 404 permit, a jurisdictional determination as to whether the discharges were occurring in waters of the United States, or a site-specific pre-approval. As a result of this IR, it may be more onerous to qualify for 404(f)(1)(A) exemptions.

#### **The IR Adds Confusion and the Agencies Have Failed to Clarify Key Issues Regarding the Application of the 404(f)(1)(A) Exemptions**

The IR provides little context or explanation regarding how the EPA and the Corps interpret the 404(f)(1) exemptions—an area already associated with great confusion within the agricultural community.

The agencies have also failed to provide clarity on the following important issues:

1. Whether a farmer needs pre-approval for any normal farming activities not listed;
2. Whether pre-approval is required if the farmer implements one of the 56 listed practices in “Waters of the U.S.” without complying with NRCS conservation practice standards;
3. Whether the 124 NRCS conservation practices not specifically listed are also exempt from section 404 permit requirements as “normal” farming activities if they incidentally result in a discharge of dredged or fill material;
4. How the IR will be enforced;
5. Whether and how a farmer should ensure compliance with the NRCS conservation standards (according to the MOA, if the farmer does not seek technical assistance from NRCS in identifying and implementing the conservation standards, the farmer has the responsibility to ensure that implementation of the conservation practices is in accordance with the applicable NRCS standard or the practice will not be exempt);
6. The interplay between the IR and state agricultural programs and requirements;
7. The interplay between the NRCS (authority for agricultural programs and technical assistance with implementing the NRCS standards) and the Corps and EPA (CWA authority); and
8. Whether the regulated community and the public will have any opportunity for comment on changes to the list of covered conservation practices as the agencies consider additions or deletions in the future.

#### **Conclusion**

Farmers and ranchers are concerned that the agencies have taken otherwise voluntary conservation standards and turned them into what are now Clean Water Act

compliance tools. It is also unthinkable to have NRCS become the “normal farming police” or an enforcement agency for EPA and the Army Corps.

#### ATTACHMENT 1

#### STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION

#### BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

#### REGARDING: POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE CLEAN WATER ACT JURISDICTION RULE

BY BOB STALLMAN, PRESIDENT, AMERICAN FARM BUREAU FEDERATION

June 11, 2014

#### I. Introduction

The American Farm Bureau Federation thanks the Committee for holding this hearing and welcomes the opportunity to offer its perspective about the impacts of the Environmental Protection Agency's and Army Corps of Engineers' “Waters of the U.S.” proposed rule. AFBF has carefully analyzed the proposed rule and has concluded that it poses a serious threat to farmers, ranchers and any other individual or business whose livelihood depends on the ability to use the land.

The proposal published April 21, 2014, in the *Federal Register* would categorically regulate as “navigable waters” countless ephemeral drains, ditches and other features across the countryside that are wet only when it rains and may be miles from the nearest truly “navigable” water. It would also regulate small, remote “wetlands”—which may be nothing more than low spots on a farm field—just because those areas happen to be adjacent to a ditch or located in a floodplain. EPA says its new rule will reduce uncertainty, and I suppose that much is true. There will not be much uncertainty if the Federal Government could regulate every place where water flows or stands when it rains.

A picture is worth a thousand words, so I would ask that Members of the Committee look at some of the images EPA has used to publicize the proposed rule. Compare those images with the types of features commonly found on agricultural land, which we believe would be swept inappropriately into Federal jurisdiction.

#### EPA's Images



#### Images from Farm Bureau Members



We believe that the proposed categorical regulation of these land features amounts to an attempted end-run around Congress and two Supreme Court rulings. The Supreme Court, in separate decisions in 2001 and 2006, ruled that Congress

meant what it said in the Clean Water Act: “navigable waters” does not mean all waters. Yet the proposal will significantly expand the scope of “navigable waters” subject to Clean Water Act jurisdiction by regulating innumerable small and remote “waters”—many of which are not even “waters” under any common understanding of that word. To farmers, ranchers and other landowners, these features look like land, and this proposed rule looks like a land grab.

Contrary to EPA’s assurances to farmers and ranchers, this expansion of Federal regulatory reach would essentially negate several longstanding statutory exemptions for agriculture. Congress established these exemptions to prevent Federal permit requirements—and potential permitting roadblocks—for working the land and growing our nation’s food, fiber, and fuel. Under this rule, farmers and ranchers will have to get Federal permits for ordinary and essential agricultural activities, just because those activities may cause dirt, fertilizer or crop protection products to fall into a dry ditch or a low spot on the field.

In addition to our concerns about the rule itself, we are concerned that EPA and the Corps have established a 90 day comment period that directly coincides with the planting and growing season, when farmers and ranchers have limited time to learn about the rule and comment on it. We ask the Committee to support an extension of the comment period. We also urge Committee Members to vigorously oppose the rule as it is currently proposed.

## II. The Proposed Rule Significantly Expands the Definition of “Navigable Waters”

The proposed rule adopts three primary definitional changes that result in a significant expansion of Federal control over land and water resources across the nation.

- First, the proposed rule regulates **“ephemeral streams” as tributaries**. “Ephemeral streams” are just dry land most of the time. To a farmer, an “ephemeral stream” is often simply a low area across the farm field.
- Second, the proposed rule categorically regulates as “tributaries” ***all* ditches** that *ever* carry any amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water. Ditches are commonplace features prevalent across farmland (and the rest of the nation’s landscape).
- Third, the proposed rule would regulate all waters deemed **“adjacent” to other jurisdictional waters (including dry ditches and ephemerals) plus any “other waters” that have a “significant nexus.”** These categories have the potential to sweep into Federal jurisdiction vast numbers of small, isolated wetlands, ponds and similar features on farmlands nationwide.

These changes, described in more detail below, will trigger substantial new roadblocks and costs for farming, ranching, the construction of homes, businesses and infrastructure, and innumerable other activities across the countryside. EPA’s public relations campaign notwithstanding, the proposed rule expands Clean Water Act jurisdiction beyond its current scope (as properly limited by the Supreme Court) and far beyond the scope intended by Congress in 1972.

### A. Ephemeral Drainages Are “Tributaries” Under the Proposed Rule

The *American Heritage Dictionary* (1982) defines “tributary” as “a stream or river flowing into a larger stream or river.” This common understanding of “tributary” simply does not include so-called “ephemerals”—low areas or ditches that carry water only when it rains.

The proposed rule, however, would define “tributary” to include all areas of dry land where rainwater sometimes flows through an identifiable path or channel, so long as that path or channel ultimately leads (directly or through any number of other paths or channels) to a creek or stream that in turn ultimately flows to navigable waters. **The agencies propose to identify a “tributary” based on the presence of a bed, bank, ordinary high water mark (OHWM) and any minimal amount of flow** that eventually reaches navigable waters.

- The terms **“bed” and “bank”** simply mean land with lower elevation in between lands of higher elevation. All but the flattest terrain will have natural paths of lower elevations that water—obeying the laws of gravity—will follow.
- **“Ordinary high water mark”** is an equally broad term that encompasses any physical sign of water flow, such as changes in the soil, vegetation or debris. When rainwater flows through any path on the land, it tends to leave a mark. The agencies themselves recognize that the definition of OHWM is vague, am-

biguous and inconsistently applied.<sup>1</sup> In fact, an official from the Corps' Philadelphia District has observed that, due to inconsistent interpretations of the OHWM concept, as well as inconsistent field indicators and delineation practices, identifying precisely where the OHWM ends is nothing more than a judgment call.<sup>2</sup>

- The agencies make no bones about their view that the **frequency, duration and volume of flow will no longer have any relevance** to determining whether a feature, like the low spot on a farmer's field, is jurisdictional. Low areas where rainwater channels will be "navigable waters" if they carry any rainwater that eventually reaches an actual navigable water.

We all know that water flows downhill, and, at some point, much of that water eventually finds its way into a creek, stream or river. Yet based on nothing more than the flow of rainwater along a natural pathway across the land, the agencies propose to categorize vast areas of otherwise dry land as "tributaries" and therefore "navigable waters." These are areas that the average person would not recognize as a stream, let alone "navigable waters" appropriate for regulation by two Federal agencies. It would be funny if it were not so frightening.

The following photos show a farm field in central Michigan over the course of 2 weeks. The path where rainwater flowed on April 14, 2014, was almost completely dry by April 25. However, demarcations in the vegetation show that water flowed there. If the water that flowed through this field eventually found its way to a creek, stream or ditch that in turn eventually flowed to navigable waters, then this farmer's field could be "navigable water" under the proposed rule.



<sup>1</sup> GAO Report "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," Feb. 2004.

<sup>2</sup> Presentation by Matthew K. Mersel, USACE, "Development of National OHWM Delineation Technical Guidance," March 4, 2014.

**April 18, 2014**



**April 25, 2014**



A bed, bank and OHWM are common features on lands that are perfectly dry, except when it rains. Indeed, in *Rapanos*, Justice Kennedy expressed deep concern that the physical indicators of a bed, bank and OHWM are so broad that they could be used to assert jurisdiction over waters that have no significant nexus to traditionally navigable waters. (547 U.S. at 781–82.) That is precisely what the agencies have done. Rather than asserting jurisdiction only where specific features are found to have a significant effect on navigable waters (accounting for the volume of flow, proximity, *etc.*), the agencies classify **all ephemeral features as jurisdictional waters if any flow can reach a traditional navigable water**. Such a broad assertion of Federal jurisdiction takes “waters of the U.S.” far beyond what Congress

intended in 1972—and far beyond what this body and the American public should tolerate.

*B. Nearly Every Ditch Across the Country Could Be Regulated as a Tributary Under the Proposed Rule*

In its public outreach on the proposal, EPA repeatedly insists the rule “does not expand jurisdiction over ditches.” This is simply false.

The proposed rule would **categorically regulate as “tributaries” virtually all ditches that ever carry any amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water.**

The only excluded ditches would be a narrowly defined (one might say mythical) category of ditches “excavated wholly in uplands,” draining only uplands, and with less than perennial flow.<sup>3</sup> The preamble explains that this exclusion applies only to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule, but presumably means not waters or wetlands) at *all* points “along their entire length.” 79 *Fed. Reg.* at 22,203.

The exception is essentially meaningless. **One would be hard pressed to find a ditch that at no point along its entire length includes waters or wetlands.**

- First, over the last several decades, the agencies have expanded their regulatory footprint by broadening the criteria for classifying land as “wetland” (*e.g.*, expanding the list of wetland vegetation). In many cases, low spots on the landscape that were not considered wetlands in the 1970s and 1980s would certainly be considered wetlands today. Since the purpose of ditches is to carry water, many ditches will tend to develop “wetland” characteristics and therefore not be “wholly in uplands.”
- Second, because the purpose of a ditch is to carry water, few ditches are excavated along the tops of ridges. The most logical places to dig storm water ditches are at natural low points on the landscape. Clearly, most ditches will have some section that was excavated in a natural ephemeral drain or a low area with wetland characteristics. Such ditches will not qualify for the proposed exclusion for “wholly upland” ditches.
- Third, the “less than perennial flow” requirement will likely disqualify many irrigation ditches from the exclusion. Irrigation ditches do not just carry storm water; they carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals or actual navigable waters that are the source of irrigation water—and they channel return flows to those source waters. In arid sections of the nation, these irrigation ditches, and the valuable surface water that flows through them, are highly regulated by state authorities that appropriate water based on vested water rights and permit systems. Under the proposed rule, such irrigation ditches will also be federally regulated as “tributaries.”

Given the expansive definition of “tributary” and the extremely limited exclusion, the vast majority of ditches in the U.S. will be categorically regulated as “navigable waters” under the proposed rule. The results could be startling. For example, the typical suburban homeowner would likely be surprised to find that EPA and the Corps view the roadside ditch at the edge of her lawn as “navigable water” worthy of the full weight of Clean Water Act protections. She would also likely be surprised to find that landscaping, insect control or even mowing the grass in that ditch are violations of the Clean Water Act. Yet that will be the result of the proposed rule.

Will EPA seek enforcement against a homeowner mowing the lawn? Probably not. But the fact that it *could* illustrates the ridiculous implications of the proposed rule. In addition, if the agencies will have to pick and choose which discharges they *actually* regulate, then the rule hardly provides the certainty that the agencies claim.

*C. Virtually Every Other Water Feature Can Be Regulated Under the Proposed Rule as Either an “Adjacent Water” or “Other Waters”*

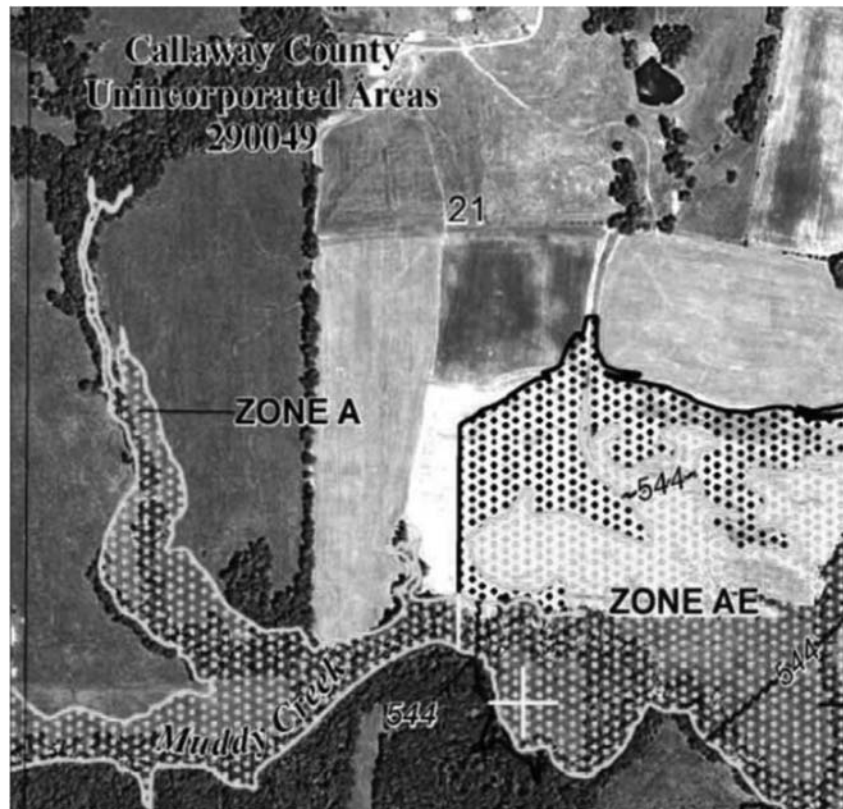
The proposed rule would regulate all waters deemed “adjacent” to other “waters of the U.S.”—including “tributaries” (ditches and ephemerals). The agencies broadly define “adjacent” as “neighboring,” which includes features located in the “riparian

<sup>3</sup>The rule would articulate an additional “exclusion” for ditches that “do not contribute flow” of any amount to actual navigable waters. However, such ditches would not meet the expansive “tributary” definition anyway. Further, such ditches are presumably quite rare, as the primary purpose of most (if not all) ditches is to carry water.

area”<sup>4</sup> or floodplain of any other jurisdictional water, or features with a “shallow subsurface . . . or confined surface hydrologic connection.”<sup>5</sup> Whether any of these characteristics exist will be determined in the agency’s “best professional judgment.” 79 *Fed. Reg.* at 22208. Thus, the exact scope of “adjacent” waters is left to the vagaries of inconsistent regulators.

Long, linear features, such as ditches, will have floodplain and riparian areas around them—and will often have “hydrologic connections” to nearby wetlands or ponds. For this reason, the inclusion of small, isolated wetlands, ponds and similar features that are “adjacent” to ditches would sweep into Federal jurisdiction countless small and otherwise remote wetlands and ponds that dot the nation’s farmlands.

The following image shows the 100 year and 500 year floodplain of Muddy Creek (a true navigable water) superimposed on a farmer’s property in Missouri. Under the proposed rule, EPA and the Corps could determine any “water” within the shaded areas to be “adjacent” to Muddy Creek. Of course, more “waters” still could be swept in as “adjacent” to the ditches and ephemerals that flow toward Muddy Creek.



- Blue-dotted area is 100-year floodplain.
- Black-dotted area is 500-year floodplain.

Source: FEMA Floodplain Maps.

<sup>4</sup>“Riparian areas” are defined in terms useful only to a hydrologist: “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.”

<sup>5</sup>The preamble explains that wetlands or ponds that “fill and spill” to ditches or other ephemeral features during intense rainfall would be viewed as having a confined surface hydrologic connection to those features. 79 *Fed. Reg.* at 22208. Such wetlands or ponds would therefore be “navigable waters,” no matter how small or remote they are from true navigable waters.

For those “other waters” that do not fall within the broad categories of “tributary” or “adjacent” waters (*e.g.*, even more isolated wetlands, ponds and the like), the proposed rule establishes jurisdiction where those waters have a “significant nexus” to another “water of the U.S.” “Significant nexus” means “more than speculative or insubstantial effect” that a water, alone or in combination with other similarly situated waters in the region, has on the “chemical, physical or biological integrity” of a navigable water. The same “region” would be interpreted as the “watershed that drains to the nearest traditional navigable water, interstate water or the territorial seas . . .” 79 *Fed. Reg.* at 22212. The preamble provides page after page of potential scientific indicators of physical, biological and chemical connections. See 79 *Fed. Reg.* at 22213–14. The possibilities are so numerous and broad that regulators will have no difficulty finding a significant nexus for even the most minor features when combined with all similar features in the watershed.<sup>6</sup>

#### *D. EPA’s Public Statements Regarding the Proposed Rule are Misleading*

The proposed rule and EPA’s public statements in support of it are misleading to the public and regulated communities. The proposal is cloaked in scientific-sounding jargon and words that evoke images of rivers, streams and swamps—images that bear no resemblance to the land features the rule would regulate. For example:

- “Waters” (as used in the rule) can be ditches or low spots on a field that are dry except when it rains.
- “Bed, bank and ordinary high water mark” includes land with only subtle changes in elevation—any land where rainwater naturally channels as it flows downhill.
- “Wetland” has come to mean areas where water-tolerant vegetation can be found, even if the land isn’t particularly “wet” most of the time.

To the general public, such terms may conjure images of flowing waters or swamps appropriate for Clean Water Act protection and regulation. In reality, they are being used to regulate *land* as if it were *water*—and “navigable water” at that.

EPA has claimed repeatedly that the proposed rule would not assert jurisdiction over “new types of waters” or beyond waters that were “historically covered” and would “not expand jurisdiction over ditches.” These statements are misleading, at best—and the last one is simply false.

First, the text and preamble of the current regulations (promulgated in 1986 by the Corps and in 1988 by EPA) contain *no reference* to “ephemeral” streams or drains. Likewise, the regulations say nothing to suggest that ditches can be “tributaries.” EPA and the Corps have asserted in *guidance* and in *enforcement actions* that certain ditches and “ephemeral streams” are subject to CWA jurisdiction as “tributaries,” but that is *ad hoc* “regulatory creep,” not proper notice-and-comment rulemaking. In other words, the fact that EPA and the Corps have at times asserted jurisdiction over these “types” of features does not make it right—and does not make it lawful to categorically regulate virtually all ditches and ephemerals.

Second, “historically”—*i.e.*, before the Supreme Court’s ruling in *SWANCC*—there was no real limit to the scope of CWA jurisdiction as interpreted by EPA and the Corps. The agencies unlawfully asserted jurisdiction over any waters to the full reach of the interstate commerce clause. That interpretation was resoundingly rejected by the Supreme Court in *SWANCC*. Since 2007, however, agency guidance has asserted jurisdiction over “non-navigable tributaries” only after a case-by-case analysis of whether a particular feature has a “significant nexus” to true navigable waters. Key to that analysis is the volume, duration and frequency of flow, as well as proximity to downstream navigable waters. Under the proposed rule, the volume, duration and frequency of flow—as well as distance to navigable waters—are deemed *irrelevant*. See 79 *Fed. Reg.* at 22206 (“tributaries that are small, flow infrequently, or are a substantial distance from the nearest [navigable water] are essential components of the tributary network.”). All such ditches and ephemeral drains will be *categorically* deemed to be “navigable waters” if they carry *any* flow that *ever* reaches navigable waters. That—whether EPA says so or not—is a substantial expansion of Federal jurisdiction.

EPA makes much of the fact that the proposed rule “preserves” existing Clean Water Act exemptions and exclusions for agricultural activities. But under the proposed rule, ordinary farming and ranching activities will require a Clean Water Act permit despite Congress’ clear intent to exempt those activities.

<sup>6</sup> For example, “[f]unctions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat.” 79 *Fed. Reg.* at 22213.

According to Administrator McCarthy's March 25 op-ed aimed specifically at the agricultural community:

The rule keeps intact existing Clean Water Act exemptions for agricultural activities that farmers count on. But it doesn't stop there—it does more for farmers by actually expanding those exemptions. We worked with USDA's Natural Resources Conservation Service and USACE to exempt [56] additional conservation practices.

As explained below, these assurances also are misleading—another attempt to cloak the true impact of this rule.

### **III. Statutory Exemptions Intended to Prevent Federal Permit Requirements for Common Farming and Ranching Activities Will Be Rendered Almost Meaningless Under the Proposed Rule**

When it adopted the Clean Water Act, Congress specifically included several critical statutory exemptions for agriculture, each of which is severely undermined by the proposed rule.

- Section 404 exemption for “normal” farming and ranching activities
- Section 404 exemption for construction of farm or stock ponds
- Agricultural storm water discharges

These exemptions demonstrate a clear and consistent determination by Congress NOT to impose Clean Water Act permit requirements on ordinary farming and ranching activities—weather-dependent and time-sensitive activities that are necessary for the production of our nation's food, fiber and fuel. However, the proposed rule's assertion of jurisdiction over ditches and low spots on farm fields will render those exemptions almost meaningless.

#### *A. Section 404(f) Exemption for “Normal” Farming and Ranching Activities*

In the mid-1970s, when the Corps began to define “navigable waters” to include certain wetlands—so as to make farming, ranching and forestry practices within those wetlands potentially subject to Clean Water Act regulation—Congress amended the Act to specifically exempt “normal” farming, ranching and forestry from section 404 “dredge and fill” permit requirements. 33 U.S.C. § 1344(f)(1). Thus, “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices” are generally exempt from section 404 permitting requirements. 33 U.S.C. § 1344(f)(1)(A). Only if the activity's purpose is to convert an area of navigable water into a use to which it was not previously subject, or where the reach of navigable waters may be reduced, (*e.g.*, to convert wetland to non-wetland) will the activity require a 404 permit. 33 U.S.C. § 1344(f)(2) (the so-called “recapture” provision).

On March 25, 2014, the agencies issued an immediately effective “interpretive rule” concerning the application of “normal” farming exemptions to 56 listed conservation practices. Although EPA claims to have “expanded” agriculture's Clean Water Act exemptions through this interpretive rule, that is not true. Rather, as described below, the interpretive rule provides no meaningful protection from the harmful implications of the expansion of “navigable waters” and, in fact, further narrows the already limited “normal” farming exemption.

#### **1. The Normal Farming Exemption Only Applies to Section 404 “Dredge and Fill” Permitting, Not NPDES Permitting or Other Clean Water Act Requirements**

The normal farming exemption only applies to the section 404 “dredge and fill” permit program. It provides no protection from potential liability and requirements of any other part of the Clean Water Act, including section 402 National Pollutant Discharge Elimination System (NPDES) permit requirements for discharges of other “pollutants.” The agencies' proposed expansion of jurisdiction means that everyday weed control, fertilizer applications and any number of other commonplace and essential farming activities may trigger Clean Water Act liability and section 402 permit requirements if even small amounts of dust, nutrients or chemicals fall into dry ditches, ephemerals or low spots (small “wetlands”) located beside, between or within farm fields.

The normal farming exemption also will not protect farmers from new restrictions (or prohibitions) on farming practices that arise from the establishment of water quality standards and “total maximum daily loads” under Clean Water Act section 303 for the ditches, ephemerals and other features EPA now plans to sweep into Federal jurisdiction. These requirements apply to all “navigable waters” under the

Act, and thus they will apply to dry ditches, ephemerals and low spots on fields, too, if those features are defined as jurisdictional waters.

2. The Normal Farming Exemption Only Applies to Farming or Ranching Ongoing Since the 1970s

Since 1977, the agencies have narrowly interpreted the “normal” farming, ranching and silviculture exemption to apply only to “established” operations “ongoing” since 1977 (when the exemption was enacted and the Corps’ implementing regulations were adopted). *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). Newer farms, or farms where farming ceased since 1977 and later resumed, or sometimes even farms that have switched from one crop to another since 1977, will all fall outside of the exemption. *See, e.g., Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff’d* 537 U.S. 99 (2002) (finding that conversion of ranch lands to orchards and vineyards falls outside normal farming exemption). Therefore, if the new interpretive rule provides any benefit for any farmers and ranchers, it will only be for those who have been farming or ranching continuously at the same location since 1977. *See* Interpretive Rule at 2.

Reading the preamble to the proposed rule closely, one can see how regulating ephemeral drains as “waters of the U.S.” would render the normal farming exemption meaningless. The reason lies in the so-called “recapture” provision of section 404(f)(2). This provision negates the exemption where farming impairs the flow or reduces the reach of navigable waters. In the context of discussing ephemeral “tributaries” in the proposed rule, the agencies reveal that if plowing or discing the soil on farmland eliminates what would otherwise be an identifiable bed, bank and OHWM, that farming requires a section 404 permit because it has reduced the reach of jurisdictional waters. *See* 79 *Fed. Reg.* at 22204, fn. 8, and accompanying text. Of course, this means that any plowing that has already eliminated a bed, bank or OHWM of an ephemeral drain in a farm field without a 404 permit was (in the view of the agencies) a violation of the Act.

3. The Agencies Have Further Narrowed the Normal Farming Exemption By Making It Contingent on Compliance With NRCS Standards

To the extent a farmer or rancher has a long-standing operation that would qualify as “normal” farming and ranching, the new interpretive rule further narrows the existing exemption by requiring compliance with NRCS technical standards for the 56 listed conservation practices. Many of the listed “conservation practices” are extremely common farming and ranching practices—such as fencing, brush management and pruning shrubs and trees—which we believe are already exempt.

The agencies claim to be “clarifying” the exemption for 56 listed activities, but, at the same time, the interpretive rule *requires* compliance with specific NRCS standards—something that was never required before to qualify for the “normal” farming and ranching exemption. Therefore, the practical effect of the interpretive rule is to narrow the existing exemptions, rather than broaden them as EPA claims. The rule explicitly states that farmers who deviate from NRCS standards will not benefit from the exemption.<sup>7</sup> Farmers who could previously undertake these activities (which, again, include things as commonplace as fencing) as part of their “normal” farming or ranching now *must* comply with NRCS standards or risk Clean Water Act enforcement.

The interpretive rule does not clarify which regulatory agency has final authority on compliance with NRCS standards—but the answer appears to be EPA. The rule states that a farmer not enrolled in a USDA cost share program is responsible for ensuring the practice meets all NRCS criteria, and NRCS is responsible for ensuring the practice meets the criteria where there is a USDA contract. Ultimately, however, EPA has reserved its Clean Water Act authority to make all final determinations. Even if a farmer and NRCS believe that the practice meets the appropriate standards, EPA presumably could veto that determination.

The new rule also raises questions about the status of other practices for which NRCS has developed standards, but that are not included in the list of 56 conservation practices. Examples include “Residue and Tillage Management, Reduced Tillage” (practice #345), pond (practice #378), and cover crop (practice #340).” The implication of *not* listing these practices is that they *will* require a section 404 permit

<sup>7</sup> *See* Interpretive Rule at page 2 (“To qualify for this exemption, the activities must be part of an ‘established (*i.e.*, ongoing) farming, silviculture, or ranching operation,’ consistent with the statute and regulations. The activities must also be implemented in conformance with NRCS technical standards.”).

if any incidental discharge of “dredged or fill” material occurs. This could have a chilling effect on the implementation of conservation practices on farms and ranches.

Further, EPA and the Corps could alter or retract the interpretive rule at any time. Even for those farmers who may perceive value in the “assurances” offered by this new guidance, the fact that it could be changed or eliminated at any time, without advance public notice, robs them of that so-called assurance. For that matter, the standards to which the exemption is now tied can be unilaterally changed by NRCS at any time without rulemaking. We see little value or certainty for farmers under these circumstances.

#### *B. Section 404 Exemption for Construction or Maintenance of Farm Ponds*

Another agriculture-related exemption in section 404 of the Act is the exemption for “construction or maintenance of farm or stock ponds or irrigation ditches.” 33 U.S.C. § 1344(f)(1)(C). This provision exempts from 404 “dredge and fill” permit requirements any discharge of dredge or fill materials into waters of the U.S. for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches.

Through guidance and enforcement actions, the Corps has interpreted the farm pond exemption narrowly and applied the so-called “recapture” provision broadly. If construction or maintenance of the pond results in earth-moving activities that reduce the reach or change the hydrology of a water of the U.S., the Corps takes the position that the “recapture” provision applies and the discharge is unlawful without a permit. In the Corps’ view, impounding a jurisdictional feature is an unlawful “dredge and fill” discharge, and the resulting impoundment is itself “waters of the U.S.” 77 *Fed. Reg.* 22188, 22201 (Apr. 21, 2014). In the experience of many farmers, where wetlands or non-navigable “tributaries” are involved in farm or stock pond construction, the recapture provision essentially swallows the exemption. Farmers have been ensnared in litigation and enforcement due to the creation of ponds that impound small ephemeral streams. See, e.g., <http://agfax.com/2014/03/21/epa-vs-rancher-clean-water-act-battle-dtn/> (EPA asserting jurisdiction over rancher’s stock pond used to support ongoing farming activities).

The proposed rule will further limit farmers’ and ranchers’ ability to build and maintain farm ponds. As explained above, the proposed rule will establish jurisdiction over virtually every ephemeral drain as a “tributary.” Thus, any impoundment of those drainage features will be an unlawful discharge absent a section 404 permit, and the resulting farm pond itself will become “waters of the U.S.” In addition, any construction of a farm pond in a small low spot (“wetland”) swept into Clean Water Act jurisdiction under the “adjacent” or “other waters” provisions of the proposed rule (discussed above) will also require a section 404 permit and will result in a pond that is itself waters of the U.S.

This aspect of the rule will affect countless (maybe most) farm and stock ponds. By expanding jurisdiction to include common ephemeral drains and isolated wetlands, the rule will prohibit the impoundment of these natural drainage or depressional areas that are often the *only* rational way to construct a farm or stock pond. Farm or stock ponds are typically constructed at natural low spots on the farm or ranch property, to capture storm water that enters the pond through sheet flow and ephemeral drains. Depending on the topography, pond construction may be infeasible without diking a natural drainage path on a hillside.

The proposal includes an exclusion from the definition of waters of the U.S. for “artificial lakes or ponds created by excavating and/or diking *dry land* and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” This exclusion is almost meaningless because, as discussed above, “dry land” is interpreted to exclude anything that qualifies as a wetland or any ephemeral feature where storm water naturally channels. This leaves little “dry” land available for the construction of farm ponds. Put simply, farm and stock ponds are not excavated on hill tops and ridges, they are excavated at low spots where water naturally flows and collects. Thus, the proposed farm pond exclusion will be meaningless for most farmers and ranchers.

#### *C. Exemption for Agricultural Stormwater and Irrigation Return Flows*

Another key agricultural exemption in the Clean Water Act applies to “agricultural storm water discharges” and “irrigation return flows.” Under this exemption, precipitation runoff and irrigation water from farms and ranches is specifically excluded from regulation as a “point source” discharge. The exemption applies even if the storm water or irrigation water contains “pollutants” and is channeled through a ditch or other conveyance that might otherwise qualify as a “point source” subject to Clean Water Act section 402 NPDES permit requirements. The exemption shows Congress’ clear intent to exclude farmers and ranchers from Clean Water Act

liability and permitting for activities on farm and ranch lands that may result in “pollutants” being carried by precipitation or irrigation flows into navigable waters.

The proposed rule would severely undermine this exemption by regulating as “waters of the U.S.” the very ditches and drains that carry storm water and irrigation water from farms. As drafted, the statutory exemption applies to pollutants discharged to navigable waters *carried by* storm water or irrigation water, which would typically flow through ditches or ephemeral drains. However, the exemption arguably does not cover the direct addition of pollutants into “navigable waters” by other means (such as materials that fall into or are sprayed into navigable waters).

Because storm water and irrigation ditches and ephemeral drains are ubiquitous on farm and ranch lands—running alongside and even within farm fields and pastures—the proposed rule will make it impossible for many farmers to apply fertilizer or crop protection products to those fields without triggering potential Clean Water Act liability and permit requirements. A Clean Water Act pollutant discharge to navigable waters arguably will be deemed to occur each time even a *molecule* of fertilizer, pesticide or dust falls into the jurisdictional ditch, ephemeral or low spot—even if the feature is dry at the time of the purported “discharge.”<sup>8</sup> Thus, farmers will have no choice but to “farm around” these features—allowing wide buffers to avoid activities that might result in a discharge—or else obtain an NPDES permit for farming. Technically, cattle or horses would need to be fenced out of ephemerals and low spots to avoid a direct “discharge” of manure. This is contrary to Congressional intent and would present a substantial additional hurdle for farmers to conduct essential practices to grow and protect their crops and livestock.

#### IV. Practical Implications for Farmers and Ranchers

Farming is a water-dependent enterprise. Whether they are growing plants or animals, farmers and ranchers need water. For this reason, farming and ranching tend to occur where there is either plentiful rainfall or adequate water available for irrigation (via ditches). Not surprisingly, America’s farm and ranch lands are an intricate maze of ditches and ephemeral drains. As explained above, under the proposed rule, virtually all of these features would be categorically regulated as “navigable waters.”

If the drains and ditches that cross between, among and within farm fields and pastures are regulated as “navigable waters,” the implications for farmers and ranchers will be disastrous. Except for the very narrow section 404 exemptions discussed above, regulating these features as jurisdictional “waters” would mean that *any* discharge of a pollutant (e.g., soil, dust, “biological material”) into those ditches and drains is unlawful, absent a Clean Water Act permit. Typical farming activities, such as plowing, planting, disking, insect and disease control, and fence building in or near ephemeral drains, ditches or low spots could be a violation of the Clean Water Act, subject to civil penalties of up to \$37,500 per violation per day—or even higher criminal penalties—unless a permit is obtained.

#### V. The Proposed Rule Suffers from Several Procedural Flaws

The agencies’ economic, technical and small business analyses are severely flawed. First, according to an expert review by Dr. David Sunding, the agencies’ economic analysis contains numerous glaring and problematic errors that “are so severe as to render [the economic analysis] virtually meaningless.”<sup>9</sup> Second, the proposed rule relies on the draft Connectivity Synthesis Report that is still undergoing vetting and peer review by the Science Advisory Board (SAB). Rather than wait for the final SAB report before drafting a proposed rule that purports to rely on the science contained in that report, the agencies plowed forward with a proposed rule that relies on a draft. It is clear that the agencies are not properly taking the science into account and that the outcomes have been pre-determined. Finally, the agencies have refused to meaningfully comply with the Regulatory Flexibility Act (RFA). The agencies erroneously certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. This certification flies in the face of the undeniably “significant” impacts the proposed rule will have on small businesses.

<sup>8</sup> Courts have long held that there is no *de minimis* defense to Clean Water Act discharge liability.

<sup>9</sup> Report by Dr. David Sunding, “Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States”, May 15, 2014. Prof. Sunding holds the Thomas J. Graff Chair of Natural Resource Economics at the University of California, Berkeley. He is the founding director of the Berkeley Water Center and currently serves as the chair of his department. He has won numerous awards for his research, including grants from the National Science Foundation, the U.S. Environmental Protection Agency and private foundations.

*A. The Economic Analysis Significantly Underestimates the Increase in Jurisdiction*

The Sunding Report concludes that “the EPA analysis relies on a flawed methodology for estimating the extent of newly-jurisdictional waters that systematically underestimates the impact of the definition change.”

A threshold problem with EPA’s economic analysis is that it analyzes the implications of only one category of Clean Water Act jurisdiction under the new proposed rule, “other waters.” As discussed above, the proposed rule includes broad new definitions (e.g., “tributary” and “neighboring”) that will categorically sweep into Clean Water Act jurisdiction countless features currently subject to only case-by-case regulation based on a significant nexus analysis. However, the economic analysis focuses solely on how jurisdiction might change for “isolated waters” that are not jurisdictional under the current Clean Water Act framework, but that are likely to become jurisdictional under an expanded definition of “other waters.”

As Dr. Sunding found, the database EPA used to estimate economic implications for incremental expansion of jurisdiction does not track information on these new terms and categories of jurisdiction. For example, EPA’s economic analysis recognizes that the “isolated waters” category does not take into account the rule’s new aggregation principle, and explains that EPA could not assess the potential impacts of aggregation of other waters within a watershed without “actual field experience.” Indeed, EPA’s analysis also acknowledges that there will be additional costs to the Corps to update the system to “reflect needed data elements” as a result of the rule’s new jurisdictional categories. EPA does not alter its analysis to account for this major deficiency. As a result, numbers extrapolated from the records, which do not marry up with the draft rule’s categories of jurisdiction, are not useful for approximating the economic implications of the percentage of increase in jurisdiction or the increase in jurisdictional acreage.

Second, the analysis relies on FY 2009/2010 as the baseline year for estimating impacts. FY 2009/2010 was a period of significant contraction in the nation’s economy, and the housing market specifically, due to the financial crisis. As a result of this contraction, there were fewer construction projects and significantly smaller projects than in periods of normal economic activity. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. Because the report bases its findings on this period of extremely low construction activity, the result is artificially low numbers of applications and affected acres. By using the number of permits issued in 2010 as a baseline, EPA significantly underestimates the affected acreage. It’s hard to imagine that only 1,300 acres would be affected, as EPA claims, when more than 106 million acres of wetlands are currently being used for agricultural purposes.<sup>10</sup>

Third, EPA’s economic analysis only considers permitting data from section 404 to estimate the potential additional percentage of acres that would come under jurisdiction. EPA then assumes that every other section of the Clean Water Act would be affected the exact same way as section 404, applying the estimated increase in percentage of acres impacted to all other relevant sections of the Clean Water Act. There is no reason to believe that this is a valid approach given significant differences in location and in permitting requirements for different economic activities. EPA recognizes this limitation,<sup>11</sup> but does nothing to address it.

*B. The Economic Analysis Significantly Underestimates the Cost of the Proposed Rule*

EPA’s economic analysis is further flawed because it underestimates the cost of the proposed rule by relying on section 404 permitting cost data that are nearly 20 years old. To make matters worse, these costs are not adjusted for inflation or any other changes in the permit system. Moreover, EPA’s analysis omits the costs of avoidance and delay, which are likely the largest out-of-pocket expenses for anyone seeking a Corps permit. While estimations of these costs are included in the report cited by EPA, they are inexplicably absent from EPA’s “review and synthesis.” According to the report EPA cites, individual section 404 permit application costs were measured as \$43,687 plus \$11,797 per acre of impacts to “waters of the U.S.” For nationwide permits, costs were measured as \$16,869 plus \$9,285 per acre of “waters of the U.S.” impacted.<sup>12</sup> If those figures were updated to 2014 dollars in order to account for inflation the application costs are even more astounding. In 2014 dollars,

<sup>10</sup> USDA National Resources Inventory.

<sup>11</sup> EPA 2011. *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, p. 3.

<sup>12</sup> Sunding and Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, NATURAL RESOURCES JOURNAL, Vol., 42, p. 74.

individual section 404 permit application costs would be \$62,166 plus \$16,787 per acre of impacts to “waters of the U.S.” For nationwide permits, costs would be \$24,004 plus \$13,212 per acre of “waters of the U.S.” impacted. (*See* Sunding Report at 17.)

EPA’s analysis further underestimates costs for some programs, like section 303 (state water quality standards, “total maximum daily loads” and implementation plans) and section 402, by assuming them to be “cost-neutral or minimal” without providing any analysis to support this assumption. The effects of expanded jurisdiction are likely to vary significantly from program to program; however, careful assessment of program-specific effects is omitted in lieu of simplistic, generalized estimations.

EPA acknowledges that additional permit applications may require increased consultation with other agencies, which would drive up the price tag of a definitional change. EPA, however, omits these costs from its analysis.

*C. The Economic Analysis Significantly Overestimates Benefits of the Proposed Rule*

EPA’s analysis is also flawed for reasons of overestimation. Relying on third-party, outdated studies, EPA overestimates an average willingness to pay for wetland mitigation. These studies are highly problematic because they are old—nine of the ten studies EPA used are more than a decade old (the oldest is nearly 30 years old)—and do not provide accurate estimates of benefits. Many were not published in peer-reviewed journals.

EPA calculates benefits based on an unstated and improbable assumption that all of the incremental wetlands affected by the definitional change would be completely destroyed if Federal jurisdiction were not expanded. EPA then (1) presumes that benefits calculated for a specific geography and time can be readily applied elsewhere, forcing a comparison between different types of wetlands being considered, and (2) makes the assumption that the public would be willing to pay the same amount to protect an isolated low spot or pond as they would a high-value wetland. This significantly biases EPA’s analysis. Even the studies cited by EPA show highly localized impacts that are not broadly applicable beyond the study site.

EPA makes little effort to account for changes in economic trends, recreational patterns and state preferences over time. Finally, EPA suggests there may be “across the board” savings in program enforcement related to increased clarity in the Clean Water Act program.

Taking these underestimates and overestimates into account, Dr. Sunding concludes that EPA’s analysis suffers from a lack of transparency and that the methodology, errors and omissions render it virtually meaningless.

*D. The Agencies’ Rulemaking Does Not Take Into Account Scientific and Technical Underpinnings*

The agencies’ proposed rule relies on a draft review of the scientific literature on “connectivity” currently under review by an SAB. The agencies have drafted the proposed rule in reliance on the draft Connectivity Synthesis Report, without waiting for the SAB’s final report. Sending a proposed rule to OMB for interagency review before the SAB completes its peer review demonstrates that the agencies are not properly taking the science into account and that the outcomes have been pre-determined. Any proper rulemaking should begin with an agency collecting, developing and then appropriately evaluating all of the relevant science. The agency should seek to validate or correct its understanding of the science through conducting independent scientific peer review. Finally, the agency should use what is learned through a vetting process to inform any policy or regulatory decisions.

Instead, EPA has asked the SAB to engage in a *post hoc* review of a severely limited portion of the science that will be used to justify a rule that has already been written. EPA’s decision to develop a rule based on a scientific report that has not undergone external scientific peer review calls into question the legitimacy of the rulemaking process. EPA should allow the SAB to complete its review. The agencies should extend the comment period on the proposed rule until after this process is complete and the report is thoroughly vetted to ensure that any final rule is based on the final, peer-reviewed connectivity report.

*E. The Impacts to Small Business Are Staggering*

On April 23, the House Small Business Committee added the proposed rule to its website alerting small businesses to burdensome Federal regulations. According to Committee Chairman Sam Graves (R-Mo.), the “EPA and Corps are proposing to expand the jurisdiction of the Clean Water Act to include nearly every damp patch of land in the United States.” Graves termed the proposed rule a “regulatory overreach,” saying:

[This] means small businesses and landowners may need costly permits and face lengthy delays for ordinary activities on private property. Projects may need to be redesigned or relocated to satisfy Federal regulators. Worse, permit applications may be denied. This extraordinary intrusion into the lives of many farmers, ranchers and small business owners has the likely potential to be economically devastating and must be stopped.

The agencies have not properly complied with the procedural requirements of RFA. The agencies try to dodge the RFA by claiming that the “scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations.” 79 *Fed. Reg.* at 22220. Therefore, “because fewer waters will be subject to the Clean Water Act under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations . . . [and] will not have a significant adverse impact on a substantial number of small entities.” *Id.* The agencies thus erroneously conclude that no RFA analysis is required.

But there can be no question that the proposed rule has direct effects not only on regulated entities, but also on the entire nation. The scope of Clean Water Act jurisdiction has implications that permeate all sections and programs under the Act, such as section 303 water quality standards and total maximum daily loads, section 311 oil spill prevention control and countermeasures, section 401 water quality certifications, the section 402 NPDES program and the section 404 dredge and fill permit program. These programs regulate countless diverse small business activities across the nation, from farming and roadside produce stands, to home building, to manufacturing and energy development. The agencies’ proposal expands these Clean Water Act programs geographically to cover more areas across the landscape including ditches, dry washes and desert drainages. When public or private property is deemed “waters of the United States” by the agencies, there are numerous impacts that flow from that determination, including the reduced value of land, the need to hire consultants to prepare permits, delays, restrictions on land use and the cost of complying with permitting requirements, including mitigation—not to mention the potential for permit denial or the cost of forgoing a project entirely rather than take on the bureaucracy. These widespread impacts are felt acutely by small businesses.

In Florida, for example, it is estimated that 40 percent of the value of farmland is directly attributable to its future development potential.<sup>13</sup> Thus, when Clean Water Act regulatory jurisdiction or permitting requirements are expanded over farmland, the value of that land decreases significantly because of the associated regulatory burdens. For farmers and ranchers, their land is typically their principal asset and frequently provides collateral for loans and other capital purchases needed to operate their farm or ranch. The agencies’ determination that Clean Water Act jurisdiction exists over ditches and other features on farmland may affect small farmers’ ability to obtain loans.

As another example, agricultural insect, weed and disease control will increasingly be subject to NPDES requirements under EPA’s new permit program for pesticides.<sup>14</sup> Some small business owners have estimated that it will cost an additional \$50,000 per year to comply with the new paperwork burden imposed by the pesticide permit program alone.<sup>15</sup> These burdensome NPDES requirements place severe limitations on the location and operation of many activities undertaken by small entities. Expanding the scope of waters that are regulated as “waters of the United States” to ditches and other ephemeral features only adds to the “waters” at issue in the pesticide general permit and thus exacerbates the complexities and costs of implementing this program.

The bottom line is that the expansion of the waters regulated under the Clean Water Act has enormous implications for small business entities that the agencies have not considered, much less explained.

<sup>13</sup> Plaintiff, A.J., Lubowski, R.N., and R.N., Stavins, *The Effects of Potential Land Development on Agricultural Land Prices*, 52 J. OF URBAN ECONOMICS 561, 581 (2002).

<sup>14</sup> It is estimated that under the new NPDES permit program for pesticides, 365,000 new sources will be required to obtain NPDES permits, but this estimate was made prior to, and does not account for, the expansion of jurisdiction proposed in the Draft Guidance. See EPA, “Background information on EPA’s Pesticide General Permit,” <http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm> (viewed Jun. 26, 2011).

<sup>15</sup> See Responsible Industry for a Sound Environment, “Comments in Response to Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharge from the Application of Pesticides,” Docket No. EPA-HQ-OW-2010-0257, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2010-0257-0490> (Jul. 19, 2010).

## VI. Conclusion

Farmers, ranchers and other landowners will face a tremendous new roadblock to ordinary land use because of this proposed rule. The rule will make it more difficult to farm and ranch, build homes, develop energy resources and otherwise use the land. Farm Bureau believes the proposed rule will have a detrimental effect on existing farmers, on encouraging new and beginning farmers to enter the profession and potentially on landowners' willingness to undertake conservation practices.

The agencies have obscured rather than explained the rule's impacts on farmers, ranchers and others.

We need Congress' help to fight this rule.

Thank you for the opportunity to explain our opposition to the Waters of the U.S. proposed rule. We would be glad to provide any further information the Committee may need.

### ATTACHMENT 2

June 6, 2014

DAMARIS CHRISTENSEN,  
Office of Water (4502-T),  
Environmental Protection Agency,  
Washington, D.C.;

CHIP SMITH,  
Office of the Deputy Assistant Secretary of the Army (Policy and Legislation),  
Washington, D.C.;

STACEY JENSEN,  
Regulatory Community of Practice (CECW-CO-R),  
U.S. Army Corps of Engineers,  
Washington, D.C.

Re: [EPA-HQ-OW-2013-0820; 9908-97-OW]

To Whom It May Concern:

These comments are submitted for the record on the EPA and Corps of Engineers (Corps) "Notice of Availability Regarding the Exemption From Permitting Under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices," 79 *Fed. Reg.* 22276 (April 21, 2014). Our comments address the two documents (referred to as Guidance) associated with the *Federal Register* notice, the "*Interpretive Rule Regarding the Applicability of Clean Water Act section 404(f)(1)(A)*" (IR) and the "*Memorandum of Understanding*" (MOU) among EPA, the Corps and USDA.

The American Farm Bureau Federation (AFBF) has significant concerns with the both the substance and process by which EPA, the Corps and the Natural Resources Conservation Service (NRCS) (together, the agencies) developed this Guidance. AFBF recommends that the agencies withdraw the Guidance immediately and ensure that any future changes to the normal farming exemptions comply with the Administrative Procedure Act (APA).

Given the short comment deadline and the agencies' refusal to grant an extension of time, AFBF is providing comments by June 5, 2014. However, AFBF is scheduled to meet with the agencies on June 13. If that meeting generates clarification or additional information that warrants further comment, AFBF will submit additional comments to the record.

#### **I. The 404(f)(1)(A) Is a Legislative Rule That Is Subject to APA Requirements**

AFBF does not agree with the agencies' characterization of the 404(f)(1)(A) Interpretive Rule (IR) as "interpretive." Despite the agencies' characterization, the IR is a legislative rule. The APA draws a distinction between legislative rules, which are subject to notice and comment requirements, and interpretive rules or guidance, which are not subject to such requirements. 5 U.S.C. § 553(b)(3)(A). Legislative rules, which do not merely interpret existing law or propose policies, but which establish new policies that an agency treats as binding, must comply with the APA, regardless of how they are labeled.<sup>1</sup>

<sup>1</sup> See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as legislative rule); *Natural Res. Def. Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (vacating guidance that allowed states to propose alternatives to statutorily required fees for ozone non-attainment areas as legislative rule that required notice and com-

The IR is a regulation that must be promulgated under the APA because it binds farmers and ranchers with new, specific legal obligations under the Clean Water Act (CWA). The IR modifies existing regulations interpreting the statutory term “normal farming, ranching and silviculture.” 40 CFR § 232.3(c)(1)(ii)(A); 33 CFR § 323.4(a)(1)(ii). The IR purports to continue existing statutory and regulatory exemptions, but instead the IR narrows the 404(f)(1)(A) exemption by identifying 56 activities that will be exempt only if they are conducted consistent with NRCS conservation practice standards and as part of an established (*i.e.*, ongoing) farming operation. Under the IR, previously voluntary NRCS conservation standards are made fully enforceable as part of the CWA regulatory program. The legal obligations to comply with the IR fall squarely on farmers and ranchers and not the agencies.

Both the IR and the conservation standards inventoried in the IR are written in mandatory terms, using the words “shall” and “must” to describe exactly how a farmer must comply with the 56 NRCS technical standards, often to exacting detail. If a farmer operating an “established” farming operation conducts a farming activity or conservation practice that results in a discharge of dredge or fill material into a water of the U.S., the IR clearly states that the activity “*must be implemented in conformance with NRCS technical standards.*” Failure to comply with the standards results in an unlawful discharge in violation of the CWA, subjecting the farmer to CWA penalties. As a result, on its face, this so-called “interpretive” rule is a “legislative” rule that imposes binding legal obligations on the public.

The agencies’ decision to accept “comments” only after the guidance is fully effective and enforceable precludes any meaningful public participation and is in clear violation of the APA. Contrary to the agencies’ public statements, the agencies conducted no significant public outreach during the development of the Guidance. Nonetheless, the Guidance has been in effect and enforceable against farmers since its publication in the *Federal Register* on April 21, 2014. In light of the agencies’ total failure to conduct outreach to the agricultural community and the resulting confusion, the entities that purportedly “benefit” from the Guidance did not have the opportunity to express their concerns that they will face serious enforcement consequences if they conduct their farming, ranching and silvicultural activities as they have in the past. For all these reasons, we strongly recommend that the agencies withdraw the Guidance immediately and ensure that any future changes to the normal farming exemptions comply with the APA.

## II. AFBF Has Several Major Substantive Concerns With the Guidance

With such a short comment period and the agencies’ refusal to grant an extension of the comment deadline, the public has not been given adequate time to analyze the Guidance and provide meaningful comments. Based on a preliminary review, however, AFBF has several major concerns that we urge the agencies to address.

### A. Contrary to the Agencies’ Statements, the Guidance Does Not Provide Additional Exemptions for Farmers and Ranchers

Since the publication of the IR, agency officials and agency websites have claimed that there is no change to the existing CWA section 404(f)(1) exemption for “normal” agricultural activities on “established” operations and that somehow the Guidance is providing additional protections for agriculture. *See* Op-Ed on agriculture by Administrator McCarthy, March 25, 2014 (“But it doesn’t stop there—[the rule] does more for farmers by actually expanding those exemptions.”) However, the IR does not provide farmers and ranchers with additional permit exemptions beyond what has already been authorized by Congress. Congress amended the CWA in 1977 to exempt “normal” farming, ranching and silviculture activities from section 404 “dredge and fill” permit requirements. 33 U.S.C. § 1344(f)(1). We therefore dispute the agencies’ assertions that farmers need 404 permits to conduct any of the 56 practices listed in the agencies’ IR if those practices are conducted as part of an established operation, because those activities already qualify as “normal” farming, ranching and silviculture activities. The agencies’ new interpretation does not provide additional protections for agriculture. Contrary to the agencies’ assertions, the Guidance has effectively narrowed, rather than expanded the current exemptions, and NRCS conservation standards that were previously voluntary are now fully en-

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ment); *National Mining Ass’n v. Jackson*, 856 F. Supp. 2d 150 (D.D.C. 2011) (finding challenge to EPA guidance and process memoranda met criteria of final agency action because, among other things, they “reflect[] an obvious change” . . . in the permitting regime set forth in section 404 of the Clean Water Act and in the regulations implementing that provision”); *New Hope Power Co. v. U.S. Army Corps of Eng’rs*, 746 F. Supp. 2d 1272, 1283–84 (S.D. Fla. 2010) (striking Corps guidance purporting to amend the prior converted croplands exclusion because it amounted to new legislative and substantive rules that created a binding norm and the Corps failed to comply with the APA).

forceable as part of the CWA regulatory program. As the MOU notes, “[d]ischarges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards.” MOU at 3. Thus, the agencies’ public statements about the Guidance are not only misleading but contradict the actual language of the guidance documents.

Moreover, the IR and MOU are insufficient notice to farmers of an enforceable change to the Congressionally authorized exemptions for “normal” agricultural practices.

#### *B. The Guidance Applies Only to the Section 404 Program*

It appears that the agencies are overstating the significance of the “normal” farming exemption, which does not apply to discharges regulated under the CWA National Pollutant Discharge Elimination System (NPDES) program. While the Guidance states the exemption for “normal farming” activities is applicable to the 404 program regulating discharges of dredge and fill materials, there is significant confusion in the farming community about the applicability to other parts of the CWA. EPA has exacerbated that confusion through its statements such as the following in EPA’s “fact sheet on benefits for agriculture”: “The proposed rule will: Preserve current agricultural exemptions for Clean Water Act permitting, including: Normal farming, silviculture, and ranching practices.”

Even if the IR would somehow benefit some farmers or ranchers, it cannot insulate any farm or ranch from any section 402 NPDES permitting requirements that may now result from the expansive definition of “waters of the United States” under the agencies’ proposed rule to define the scope of jurisdiction under the CWA. The exemption is simply inapplicable to that separate permitting program. Thus, while a farmer may be able to plant cover crops in jurisdictional waters under the IR without a 404 permit (assuming compliance with NRCS standards), that same farmer would face CWA liability for applying fertilizer or pesticide to those same fields without a section 402 NPDES permit. The public deserves more direct and clear communications from the agencies on these highly technical and complex regulatory issues.

#### *C. The Guidance will Result in More Time-Intensive and More Costly Requirements for Farmers and Ranchers*

Before the IR, farmers and ranchers did not need to satisfy federally mandated practice standards for “normal” agricultural activities subject to CWA section 404(f)(1)(A) exemptions. Farmers could engage in ordinary farming activities without the need for a section 404 permit, a jurisdictional determination whether the discharges were occurring in waters of the United States, or a site-specific pre-approval. As a result of this IR, it may be more onerous to qualify for 404(f)(1)(A) exemptions.

The 56 listed NRCS conservation practice standards include typical farming activities, such as “irrigation canal or lateral,” “irrigation field ditch,” “mulching,” and “fence,” all of which were already exempt from regulation under section 404(f)(1)(A) if conducted as part of an established farm or ranch operation. The NRCS conservation practices are detailed,<sup>2</sup> and may be more time-intensive and expensive to imple-

<sup>2</sup>For example, for fences (practice code 382), the NRCS conservation practice standards require (among other things): (1) fencing materials, type and design to be of a high quality and durability; (2) fences shall be designed, located and installed to meet appropriate local wildlife and land management needs and requirements; (3) when appropriate, natural barriers should be utilized instead of fencing; (4) the fence design and location should consider erosion, flooding potential, and stream crossings; (5) fences across gullies, canyons, or streams may require special bracing, design, or approaches; and (6) regular inspection of fences as part of an ongoing maintenance program, including a schedule for inspections after storms, repair or replacement of loose materials, removal of trees/limbs, replacement of water gaps, repair of eroded areas, and repair or replacement of markers or other safety and control features. See [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1144464.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1144464.pdf).

As another example, for field borders (practice code 386), the NRCS conservation practice standards require (among other things): (1) minimum field border widths based on local design criteria, but at a minimum 30 feet with a vegetation stem density/retardance of moderate to high; (2) utilization of plants with physical characteristics necessary to control wind and water erosion to tolerable levels (no plant listed by the state as a noxious or invasive species shall be established in the field border); (3) elimination of ephemeral gullies and rills present in the planned border area; (4) select species that provide adequate habitat, food source, and/or cover for the wildlife species of interest; (5) establish plant species that will produce adequate above- and below-ground biomass for the site to increase carbon storage and plant species that improve air quality; and (6) planned operation and maintenance, including removing sediment from above, within, and along the leading edge of the field border and avoiding vehicle traffic

ment than the methods currently used by farmers and ranchers. Under the Guidance, however, farmers and ranchers are not provided any flexibility in how they conduct normal farming activities on their land. Now, in order to qualify for section 404 exemptions that previously would not have required NRCS standards compliance, ranchers and farmers must now comply with the onerous NRCS practice standards.

Moreover, as discussed above, even if farmers and ranchers are able to comply with the complicated NRCS practice standards, such compliance does not insulate their land from any section 402 permitting requirements now resulting from the agencies' proposed broadened definition of "waters of the United States."

*D. The Guidance Adds Confusion and the Agencies Have Failed To Clarify Key Issues Regarding the Application of the 404(f)(1)(A) Exemptions*

The Guidance provides little context or explanation regarding how the EPA and the Corps interpret the 404(f)(1) exemptions—an area already associated with great confusion within the agricultural community. In addition, the agencies have refused to provide even the most basic information in the IR or answer clarifying questions.

For example, the agencies have failed to clarify what constitutes "established/ongoing" farming, even though our research indicates that only farming "ongoing" since 1977 would qualify. *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). This is a key fact that should be clarified to the public if the agencies are purporting to invite farmers and ranchers to engage in these practices within waters of the U.S. without fear of CWA liability. The agencies also have failed to clarify whether the listed practices must always comply with NRCS standards to qualify for the exemption—or only when the practices (*e.g.*, fence building) are undertaken for the purpose of conservation (as opposed to other purposes). The agencies might reasonably make a policy choice to make NRCS standards "mandatory" as a condition of obtaining Federal conservation funds to implement the conservation practices. However, under no circumstances should the agencies be able to impose *CWA liability* (loss of a statutory exemption) as a consequence of a farmer's failure to comply with NRCS standards.

The agencies have also failed to provide clarity on the following important issues:

- Whether a farmer needs pre-approval for any normal farming activities not listed;
- Whether pre-approval is required if the farmer implements one of the 56 listed practices in Waters of the U.S. without complying with NRCS conservation practice standards;
- Whether the 124 NRCS conservation practices not specifically listed are also exempt from section 404 permit requirements as "normal farming activities" if they incidentally result in a discharge of dredged or fill material;
- How the IR will be enforced;
- Whether and how a farmer should ensure compliance with the NRCS conservation standards (according to the MOA, if the farmer does not seek "technical assistance" from NRCS in identifying and implementing the conservation standards, the farmer has the responsibility to ensure that implementation of the conservation practices is in accordance with the applicable NRCS standard or the practice will not be exempt);
- The interplay between the IR and state agricultural programs and requirements;
- The interplay between the NRCS (authority for agricultural programs and "technical assistance" with implementing the NRCS standards) and the Corps and EPA (CWA authority); and
- Whether the regulated community and the public will have any opportunity for comment on changes to the list of covered conservation practices as the agencies consider additions or deletions in the future.

### III. Conclusion

In sum, the Guidance raises more questions than it answers. Most importantly, as stated above, the agencies have violated the APA in finalizing this Guidance without complying with the rulemaking process. Moreover, the agencies have misled the public by claiming that the Guidance provides additional exemptions when

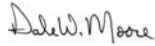
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when soil moisture conditions are saturated. *See* [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1241318.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1241318.pdf).

it actually narrows the "normal" farming and ranching exemption by imposing burdensome new requirements for farmers and ranchers.

For all these reasons, AFBF urges the agencies to withdraw the Guidance immediately and ensure that any future changes to the normal farming exemptions comply with the APA.

Sincerely,



DALE W. MOORE,  
*Executive Director, Public Policy.*

The CHAIRMAN. Thank you, Mr. Parrish. I appreciate it.  
Mr. Fabin, you are now recognized for 5 minutes.

**STATEMENT OF ANDY FABIN, PRODUCER, FABIN BROS.  
FARMS, INDIANA, PA, ON BEHALF OF THE NATIONAL  
CATTLEMEN'S BEEF ASSOCIATION; PENNSYLVANIA  
CATTLEMEN'S ASSOCIATION**

Mr. FABIN. Thank you. Good morning. My name is Andy Fabin. I raise cattle and row crops in Indiana, Pennsylvania. I am testifying before you today as a member of the National Cattlemen's Beef Association and the Pennsylvania Cattlemen's Association. Thank you to the Chairman and Ranking Member for allowing me to testify today on the impacts of the Environmental Protection Agency and the U.S. Corps of Engineers Interpretive Rule on the normal farming and ranching exemption under section 404 of the Clean Water Act.

I am extremely concerned about the devastating impacts this Interpretive Rule could have on conservation practices being implemented on the ground, especially if you couple that with the increased liability from the expansion of the *waters of the United States* definition that is also currently taking place.

As a farmer, my willingness to implement voluntary conservation practices has been greatly diminished, despite my desire to improve and protect the waters on my farm. I am not alone in my thinking, which means that if this Interpretive Rule remains in place, farmers and ranchers across the country will slow their adoption of conservation practices. Therefore, NCBA is requesting the agencies withdraw the Interpretive Rule and begin a dialogue with farmers and ranchers in order to provide actual clarity that will encourage conservation implementation.

As you can see on the screen, on my operation we run 60 cows and have 3,500 acres of corn, soybeans, wheat, and rye. Also, we operate a soybean extrusion plant in which we process in excess of 1.3 million bushels of beans into high-protein soymeal and soy oil. I have ephemeral streams running through my pastures and fields, as well as ponds and ditches. Many of these features would become Federal water under the proposal with most not falling into any of the vague and unclear exclusions that EPA and the Corps have included in the proposed definition. EPA, the Corps and NRCS would have me believe that despite the expanded definition all the activities that take place on my farm are exempted. Unfortunately, not all ag activities are exempted under the Clean Water Act, and this Interpretive Rule would expand the number of farming activities that will need permits.

The Interpretive Rule has narrowed the scope of the normal farming and ranching exemption under section 404 of the Clean Water Act. Since the 1930s, Congress has encouraged conservation activities, making them integral or normal parts of farming operations long before passage of the Clean Water Act. We believe they have always been included under the exemption.

Additionally, I am confused about the agencies' intent. If the Corps and EPA intended to clarify that the exemption covers conservation activities, why didn't they just say conservation activities are exempted as normal farming and ranching activities? They have made these voluntary standards mandatory because if you tell a farmer that he has to either comply with an NRCS standard or face the permitting requirements or violations of the Clean Water Act and its fines of \$37,500 per day, he hasn't been given any real choice at all. The only real choice is whether to do it the NRCS way or not at all. I am afraid that most farmers and ranchers will pick the latter.

NRCS was created to help farmers on a voluntary basis. Many producers like myself have a great relationship with our local NRCS agent. The Interpretive Rule states the activity must also be implemented in conformance with NRCS technical standards. There is no way to get around that this requirement makes NRCS a Clean Water Act compliance agency. Farmers and ranchers are going to allow NRCS field agents on their property knowing they are now an extended arm of the EPA and the Corps for Clean Water Act enforcement.

I do not have an NRCS-certified grazing plan for my cattle. I am concerned that the Interpretive Rule has unintentionally made grazing cattle without an approved grazing plan a violation of the Clean Water Act if they walk through a wetland on my pasture. I can't give you a better example of a normal farming and ranching activity than grazing cattle on a pasture, but apparently now that exemption doesn't consider grazing normal.

Now that the Interpretive Rule is in effect and my conservation practices are being scrutinized by the Corps and NRCS, my willingness to work with them has been significantly diminished. I am worried local NRCS personnel are going to have to spend their entire time checking compliance of voluntary conservation activities instead of assisting farmers and ranchers in continuing to improve the waters around their properties. The model of voluntary conservation that has been the pinnacle of farmers' and ranchers' protection of our natural resources is going to be upended.

Not only should the EPA and the Corps withdraw their overreaching definitions of *waters of the United States* but they should also immediately withdraw the Interpretive Rule because ultimately the only effect it will have is to decrease beneficial conservation activities.

Thank you, and I would be happy to answer any questions Members of the Subcommittee have.

[The prepared statement of Mr. Fabin follows:]

PREPARED STATEMENT OF ANDY FABIN, PRODUCER, FABIN BROS. FARMS, INDIANA, PA; ON BEHALF OF NATIONAL CATTLEMEN'S BEEF ASSOCIATION; PENNSYLVANIA CATTLEMEN'S ASSOCIATION

Good morning, my name is Andy Fabin. I raise cattle and row crops in Indiana, Pennsylvania. I am testifying before you today as a member of the National Cattlemen's Beef Association and the Pennsylvania Cattlemen's Association. Thank you to the Chairman and Ranking Member for allowing me to testify today on the impacts of the Environmental Protection Agency and the U.S. Army Corps of Engineers' interpretive rule on the Normal Farming and Ranching exemption under Sec. 404 of the Clean Water Act.

I am extremely concerned about the devastating impacts this interpretive rule could have on conservation practices being implemented on the ground, especially if you couple that with increased liability from the expansion of the "waters of the U.S." definition that is also currently taking place. As a farmer my willingness to implement voluntary conservation practices has been greatly diminished, despite my desire to improve and protect the waters on my farm. I'm not alone in my thinking, which means that if this Interpretive Rule remains in place, farmers and ranchers across the country will slow their adoption of conservation practices. Because of this negative consequence NCBA is requesting the agencies withdraw the Interpretive Rule and begin a dialogue with farmers and ranchers in order to provide actual clarity that will encourage instead of discourage conservation implementation.

On my operation we run 60 cows and have 3500 acres of corn, soybeans, wheat, and rye. Also, we operate a soybean extrusion plant in which we process in excess of 1.3 million bushels of beans into high protein soymeal and soy oil. I have ephemeral streams running through my pastures and fields, as well as ponds and ditches. It appears to me that many of these features would become Federal waters, with most not falling into any of the vague and unclear exclusions that EPA and the Corps have included in the proposed definition. If they ARE 'waters of the U.S.' I will need a 404 or 402 permit to conduct many activities near those waters, that is unless those activities are exempted. EPA, the Corps and now even the Natural Resource Conservation Service would have me believe that despite the expanded definition all the activities that take place on my farm are exempted. This is, at a minimum, a negligent mischaracterization, and more likely, an intentionally deceptive tactic being used to pacify the agricultural community. Not all agricultural activities are exempted under the Clean Water Act, and this proposal would expand the number of farming activities that will need permits, requiring many farmers like myself to seek 402 NPDES permits or 404 Dredge and Fill permits.

Specifically, the Interpretive Rule put out on the same day as the proposed definition has narrowed the scope of the Normal Farming and Ranching Exemption under Sec. 404 of the Clean Water Act. While the agencies claim that the Interpretive Rule has expanded the exemption to include a new set of 56 NRCS practices, I'm confused as to why those 56 were not considered "normal farming" practices in the first place. Is it NRCS' position that I have been violating the Clean Water Act since I have not asked for a 404 permit to implement any of my conservation practices thus far. It can be assumed that if those 56 practices are only now exempted through the Interpretive Rule, then they were not before, making all conservation practices that touched water a violation of the Clean Water Act. I don't believe this was the intent of Congress. Since the 1930s, Congress has encouraged conservation activities, making them an integral, or "normal," part of all farming operations long before passage of the Clean Water Act.

Additionally, I am confused about the agencies' intent. If the Corps and EPA intended to clarify that the exemption covers conservation activities, why didn't they just say just? They should have said "conservation practices and activities, because they are designed and implemented to protect the environment, are exempted as 'normal farming and ranching' activities." Perhaps the agencies knew they were narrowing the exemption to these 56 NRCS practices in an effort to make those practices mandatory for farmers and ranchers. I believe they have made these voluntary standards mandatory because if you tell a farmer that he has to either comply with an NRCS standard or face the permitting requirements or violations of the Clean Water Act and its fines of \$37,500 per day, he hasn't been given any real choice at all. He or she must implement an NRCS standard. The only real choice is whether to do it the NRCS way or not at all. I'm afraid that most farmers and ranchers will pick the latter. If that happens, what have we accomplished? Conservation practices will decrease and overall water quality will decrease.

NRCS was created to help farmers on a voluntary basis. Many producers like myself have a great relationship with our local NRCS agent. The Interpretive Rule states that when conducting one of the 56 chosen conservation practices, "[t]he ac-

tivities must also be implemented in conformance with NRCS technical standards,” despite whether it is a cost-shared practice or voluntary. There is no way to get around that this requirement makes NRCS a Clean Water Act Compliance agency if this Interpretive Rule is left in place. You can imagine how many farmers and ranchers are going to allow NRCS field agents on their property knowing they are now an extended arm of the EPA and the Corps for Clean Water Act Enforcement. Making NRCS a Clean Water Act compliance agency is not the way to work with farmers and ranchers. And hiding mandatory compliance with NRCS standards through the guise of an exemption is deplorable.

Not only do other NRCS practices now fall outside the scope of the “normal farming” exemption such as nutrient management and terracing, so do any voluntary practices that do not meet NRCS specifications. I have participated in many NRCS cost-shared conservation practices, but I do not have an NRCS certified grazing plan for my cattle. EPA and the Corps, along with NRCS chose these 56 practices because they have the potential to discharge if they are done in a water. Prescribed Grazing is one of those 56 standards. This makes grazing a discharge activity, and for any farmer or rancher with cattle, unless you have an approved grazing plan your cattle that walk through a wetland on your pasture are now a violation of the Clean Water Act. I can’t give you a better example of a “normal farming and ranching” activity than grazing cattle on a pasture, but, apparently now that exemption doesn’t consider grazing “normal,” and I will need a Sec. 404 permit to graze my cattle because inevitably in Pennsylvania, they will wonder through a wetland or ephemeral stream, which is now a “water of the U.S.” We believe that grazing cattle was already a “normal ranching” activity, and EPA and the Corps’ Interpretive Rule has not given farmers and ranchers anything they didn’t have before, but in fact, has taken that exemption away from many of us.

Now that the Interpretive Rule is in effect, and my conservation practices are being scrutinized by the Corps and NRCS, my willingness to work with them has been significantly diminished. I’m worried local NRCS personnel are going to have to spend their entire time checking compliance of voluntary conservation activities instead of assisting farmers and ranchers in continuing to improve the waters around their properties. The model of voluntary conservation that has been the pinnacle of farmers and ranchers protection of our natural resources is going to be up-ended.

Not only should the EPA and the Corps withdraw their overreaching definition of “waters of the U.S.,” but they should also immediately withdraw the Interpretive Rule because ultimately the only affect it will have is to decrease beneficial conservation activities. Thank you and I would happy to answer any questions Members of the Subcommittee may have.







The CHAIRMAN. Thank you, Mr. Fabin.  
I now recognize Mr. Bowling for 5 minutes.

**STATEMENT OF CHIP BOWLING, FIRST VICE PRESIDENT,  
NATIONAL CORN GROWERS ASSOCIATION, NEWBURG, MD**

Mr. BOWLING. Thank you. Chairman Thompson, Ranking Member Walz, and Members of the House Agriculture Subcommittee on Conservation, Energy, and Forestry, on behalf of National Corn Growers Association, I appreciate the opportunity to share with you our views on the EPA's Interpretive Rule regarding agriculture exemptions to the Clean Water Act.

My name is Chip Bowling. I am a third-generation farmer in Newburg, Maryland, about 45 miles due south of here. I raise corn, soybeans, wheat and grain sorghum on about 1,700 acres, and I currently serve as First Vice President of the National Corn Growers Association.

The Interpretive Rule recently issued by the EPA and the Army Corps of Engineers specifies what farmers must do to qualify for Clean Water Act's normal farming exceptions from dredge-and-fill permitting. While the policy may have been intended to be relatively limited in effect and to be of assistance to farmers by making the exception process more efficient, in practice, something very different will happen. Even if applied in the most practical and flexible manner possible, the fact remains that we are dealing with the Clean Water Act, a law that desperately needs clarification that can only be done by amendments to the statute by Congress.

In the case of the Interpretive Rule, we see the potential that farmers engaged in normal farming activities will face far greater constraints than they had before to qualify those activities for the Clean Water Act exemptions. Producers will also face a far greater Federal regulatory liability, either through the policy's implementation by the agencies in the field or from citizen enforcement suits against farmers. The Interpretive Rule establishes how the exemptions from section 404 permitting will apply to certain agricultural practices carried out under NRCS conservation practice standards. To date, some 56 practices have been identified for this purpose.

NCGA is concerned that the rule will in effect require producers to follow NRCS conservation practice standards even though many of the covered activities are a long-used normal farming practice. The current list of covered practices includes many routine farming activities such as brush management, weed control, fencing and grass waterways. These practices have always been and will continue to be regularly carried out on farms for purposes unrelated to benefiting waters of the United States simply because building a fence, managing brush or weeds and trimming trees are required to manage and operate a farm.

The question is, will the consequence of the rule be through its interpretation in the field or as a result of legal actions that farmers must closely follow the relevant NRCS standard any time they are engaged in one of these activities. If so, this is major cause for concern. Not only is this permit-like requirement for what should be an exemption activity, the everyday use of these standards is simply impractical.

For example, the standards for brush management is four pages long and requires a farmer to develop a very specific plan that is ecologically sound and defensible. I am not a big farmer. I am the entire compliance department of Bowling Farms. I find it hard to conceive how I could possibly have a written or recorded plan for each of the roughly 150 fields that I farm in my operation.

If the activities being carried out as part of an NRCS conservation program where Federal funds are being utilized to help a farmer achieve a specific conservation purpose, meeting such a standard can be sensible and good policy, but NCGA believes that requiring farmers to meet such standards as part of an everyday farming operation is unreasonable and bad policy.

In reviewing the covered practices, we find several that create this same kind of impossible compliance situation. Grass waterways are a good example. Most landowners and farmers had them on their farms. I have them on mine. And most were developed and installed without any assistance from NRCS. The NRCS standard in this instance is three pages long with very specific design criteria and engineering standards. It requires a detailed written plan and has limitation on how the waterway can be used. Portions of this standard are good practice and frankly common sense. However, if a farmer must now develop a plan for all these and meet NRCS requirements or face possible litigation under the Clean Water Act, the expense and time and money will be enormous.

The two examples that I have outlined are the type of concerns we believe to be serious and important enough to require this Interpretive Rule be withdrawn. In withdrawing the rule, it is imperative that it be made absolutely clear that this policy was meant to address only those circumstances where a practice was being adopted for conservation purposes to achieve a specific water quality goal. That notice of withdrawal must also specify such normal farming practices when carrying out as a part of the ongoing operation will qualify for section 404 for exception.

Once again, we thank you for the opportunity to provide you this testimony and your decision to hold this hearing so that these important policy matters can be thoroughly reviewed and discussed. Corn growers will continue their efforts to conserve soil, water and nutrient resources and protect water quality. We look forward to working with you and the Administration and support your good work. Thank you.

[The prepared of Mr. Bowling follows:]

PREPARED STATEMENT OF CHIP BOWLING, FIRST VICE PRESIDENT, NATIONAL CORN GROWERS ASSOCIATION, NEWBURG, MD

Chairman Thompson, Ranking Member Walz, and Members of the House Agriculture Subcommittee on Conservation, Forestry and Energy, on behalf the National Corn Growers Association (NCGA), I appreciate the opportunity to share with you our views on the U.S. Environmental Protection Agency's Interpretive Rule regarding the applicability of Clean Water Act agricultural exemptions. My name is Chip Bowling. I am the third generation on our family farm in Newburg, Maryland about 45 miles south of Washington, D.C. where we raise corn, soybeans, wheat and grain sorghum on 1700 acres. I currently serve as the First Vice President for NCGA.

The National Corn Growers Association represents more than 37,000 corn farmers from 48 states. NCGA also represents more than 300,000 corn growers who contribute to check off programs and 27 affiliated state corn organizations across the nation for the purpose of creating new opportunities and markets for corn growers.

The Interpretive Rule recently issued by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (“Agencies”) specifies what farmers must do to qualify for the Clean Water Act’s normal farming exemptions from dredge and fill (section 404) permitting under certain wide ranging circumstances. While the policy may have been intended to be relatively limited in effect and to be of assistance to farmers by making the exemption’s process more efficient, in practice something very different will happen. Even if implemented in the most practical and flexible manner possible, the fact remains that we are dealing with the Clean Water Act and its citizen enforcement provisions that encourage legal actions against individuals. Tens of thousands of dollars a day in penalties are possible under the Clean Water Act, hundreds of thousands of dollars or even far more in total. These citizen suits commonly hinge on technical, paper violations of the Clean Water Act, and persons seeking to stop a business activity can use technical and even imaginary violations as pretexts for lawsuits that can cripple a business. We have seen this very recently with one of my Maryland neighbors, a broiler farm. Fortunately, in this specific case the courts ruled in favor of the farmer, but at tremendous expense to the defendant which nearly resulted in bankruptcy. Legal liabilities such as these are always possible when dealing with the mandatory provisions of the Clean Water Act. In the case of the Interpretive Rule we see large potential for this same type of risk. This policy creates the real possibility that farmers engaged in numerous otherwise normal farming activities will face far greater constraints than before to qualify those activities for the section 404 exemptions. Producers will also face far greater Federal regulatory liabilities, either through the policy’s errant implementation by the Agencies in the field, or as the result of Clean Water Act citizen enforcement suits against farmers. For these reasons as well as others that are explained in this testimony we appreciate that you have called for this hearing and for allowing us the opportunity to provide you with our views and suggested actions that the Agencies could take to rectify these problems.

#### **Corn Growers’ Conservation Accomplishments**

Corn growers are proud of their soil, water and nutrient conservation efforts and the substantial benefits of that work. Between 1980 and 2011 soil erosion was reduced by 67 percent per bushel of corn produced and by 43 percent per acre of corn planted.<sup>1</sup> Excess sediment lost to waterways from farmland is one of the nation’s top water quality concerns, and corn producers have reduced these losses by 147 tons per year in 2011 relative to 1980. Phosphorous loss from farm land often is directly related to sediment losses, and corn growers’ erosion reduction accomplishments translate directly into less phosphorus in runoff reaching surface waters.

Corn yields per acre over this period have gone up by more than 60 percent, about 60 bushels of corn per acre. Yet at the same time the rates at which the primary corn nutrients (nitrogen, phosphorous, and potassium) have been applied per acre have declined. U.S. corn farmers produced 6.64 billion bushels of corn in 1980 and used 3.2 pounds of primary nutrients per bushel. By 2010 we produced 12.45 billion bushels of corn, but used only 1.6 pounds of nutrients per bushel. This equates to an 87 percent increase in nutrient use efficiency and translates directly into far greater quantity of nutrients being removed from the land in the form of corn grain than was the case in 1980. The net effect of this is fewer nutrients in the soil profile that might move into surface water.<sup>2</sup>

These data clearly show the practical, extensive benefits of corn growers’ commitment to practicing sound soil, water and nutrient conservation on their farms. Farmers recognize that in important ways their partnerships with Federal and state agencies like USDA’s Natural Resources Conservation Service (NRCS) and the Farm Service Agency, as well as their local soil and water conservation districts, has helped make these accomplishments possible. But without question it is the farmers themselves that are the single most important factor that makes these good things happen. Farmers, working as innovative and diligent business people, are the foundation for agricultures’ conservation accomplishments on private land.

These gains are possible because of farmers’ overall success. This necessarily means carrying out a host of normal farm and land management activities that are not in and of themselves conservation practices. Conservation on farms is simply not possible without farmers having the flexibility and latitude to carry out all of these

<sup>1</sup> Field to Market (2012 V2). *Environmental and Socioeconomic Indicators for Measuring Outcomes of On-Farm Agricultural Production in the United States: Second Report*, (Version 2), December 2012. Available at: [www.fieldtomarket.org](http://www.fieldtomarket.org). See pages 41–50 for the results for corn.

<sup>2</sup> See The Fertilizer Institute, *U.S. Fertilizer Consumption Table and U.S. Consumption of Primary Plant Nutrients*. Derived from USDA NASS data (2011). Available at: <http://www.tfi.org/statistics/fertilizer-use>.

other critical farming practices without unnecessary impediments. This is the perspective that we bring to this Interpretive Rule. A successful farmer must have the latitude to carry out all of their normal farming practices alongside and in coordination with, but not always directly related to, their strong conservation activities.

#### **Farming in the Chesapeake Bay**

As a farmer in Maryland, I know what it means to be regulated. There are very few actions that I take as a farmer where I do not first consider how they relate to my state's regulatory requirements. As I work to maintain a profitable and productive farming operation, I view my farm as a system that must incorporate mandatory measures dealing with erosion control, buffer establishment and maintenance, and nutrient management. These requirements are simply realities for farmers in Maryland. We hope, given the level of effort and the cost they entail, that these practices are benefitting water quality in the Chesapeake Bay. Recent science has made it clear that there can be decades' long lag times between what we do on the land and nutrients entering the Bay. Those lags make it difficult to determine if water quality benefits are occurring; but what we do know is that regulatory requirements, implemented inflexibly and without due consideration to farming practicalities, add undue cost and burden and will lead to some farmers just leaving the business.

#### **Waters of the U.S. Rulemaking**

Our evaluation of the Interpretive Rule is taking place against a backdrop of great policy uncertainty. The proposed rule on what are CWA Waters of the U.S. ("WOTUS") makes it extremely challenging for us to determine with precision how the Interpretive Rule will apply to us on the ground. Even when the WOTUS rulemaking is done, we will still face great uncertainty as in innumerable instances a formal determination from the Agencies will be necessary for us to know the drainage features, wet areas or other characteristic on our farms are jurisdictional waters to which this Interpretive Rule applies. We believe that the scope of the WOTUS rule will be quite broad, given its classification of all ephemeral streams, many ditches, and wet areas in the floodplain, as jurisdictional and possibly even isolated waters that lie further upland. We offer you these views with examples from my farm, applying our best judgment as to what might be WOTUS on the land I farm.

#### **The Interpretive Rule**

The Interpretive Rule establishes how the exemptions from section 404 permitting will apply to certain agricultural practices carried out under NRCS conservation practice standards. Specific agricultural practices, identified by the EPA, the Army, and USDA–NRCS, that could include the discharge of dredged or fill material in a WOTUS are deemed to be exempt "normal farming" activities if the activities are part of an "established (*i.e.*, ongoing) farming, silviculture, or ranching operation" and implemented in conformance with NRCS technical standards. The Agencies and USDA have entered into a Memorandum of Agreement (MOA) to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices and activities that could qualify for the exemption. To date some 56 practices have been identified for this purpose.

NRCS is concerned that the Rule will, in effect, require producers to follow USDA–NRCS conservation practice standards when they carry out certain activities even though many of the covered activities are long-used, normal farming practices commonly conducted for reasons unrelated to conservation and water quality goals. The current list of covered practices includes the following activities:

- Brush Management
- Herbaceous Weed control
- Prescribed Burning
- Stream Crossing
- Windbreak/Shelterbelt
- Fencing
- Fuel Break
- Field Border
- Firebreak
- Grassed Waterway
- Hedgerow Planting
- Hillside Ditch
- Land Clearing

- Mulching
- Tree Site Preparation
- Forage Management
- Forage Planting
- Prescribed Grazing
- Grazing Land Treatment
- Range Planting
- Tree/Shrub Establishment
- Windbreak/Shelterbelt Renovation
- Tree Pruning
- Forest Stand Improvement

These practices have always been, and will need to continue to be, regularly carried out on farms and ranches for purposes that are unrelated to “benefitting” WOTUS. Not that they are being carried out to the detriment of a WOTUS, but simply because building a fence, or managing brush or weeds, planting or trimming trees, planting and managing forage and all of these other farming activities are just what are required to manage and operate a farm. The question is, will the practical consequence of the Rule be, either through its interpretation in the field or as a result of legal actions, that farmers must follow closely the applicable NRCS technical standard anytime they are engaged in one of these activities?

If so, this is major cause for concern. Not only is this essentially a permit-like requirement for what should be an exempt activity, the everyday use of these standards is simply impractical. NRCS conservation practice standards for each of these practices are highly detailed, rely heavily on extensive planning involving highly specific processes, and they often cross reference each other. Not only is this unlawful policy relative to the stated purpose of exempting from permitting these normal activities, the possibilities for simple paper, technical violations are immense and lead directly to legal liabilities.

For example, the standard for “brush management” (# 314) is four pages long and requires the practitioner, among other things, to “(u)se applicable Ecological Site Description (ESD) State and Transition models, to develop specifications that are ecologically sound and defensible. Treatments must be congruent with dynamics of the ecological site(s) and keyed to state and plant community phases that have the potential and capability to support the desired plant community. If an ESD is not available, base specifications on the best approximation of the desired plant community composition, structure, and function.” Furthermore, this standard calls for plans and specifications to be clearly spelled out and recorded for each field being treated. The plans must contain at a minimum “Clearly stated goals and objectives . . . The pre-treatment cover or density of the target plant(s) and the planned post-treatment cover or density and desired efficacy . . . Maps, drawings, and/or narratives detailing or identifying areas to be treated, pattern of treatment (if applicable), and areas that will not be disturbed . . . A monitoring plan that identifies what should be measured (including timing and frequency) and that documents the changes in the plant community (compare with objectives) will be implemented.”<sup>3</sup> Brush management on my farm is a normal practice that I carry out all year long. We scout our fields at least four to six times a year around field edges and hedgerows. I find it hard to conceive of what it would entail for me to have a written or recorded plan for each of the approximately 150 fields I have under cultivation.

If these activities are being carried out as part of a USDA NRCS conservation program where Federal funds and assistance were being utilized to help the farmer achieve a specific conservation purpose in the field in question, meeting such a standard is sensible and good policy. NRCS would be committed to working with the farmer to these ends, and NRCS field staff would have the usual and customary flexibility to support the farmer through this process without worry of third party suits seeking to interrupt that work, often for reasons that are at best indirectly related to the natural resource issues at hand. But NCGA believes that requiring farmers to meet such standards as part of an everyday, farming operation when carrying out normal farming activity is unreasonable, bad policy, and unlawful.

In reviewing the other covered practices I find several that create this same kind of impossible compliance situation, or very well could do so. Grass waterways are a good example. Most landowners and farmers have grass waterways on their

<sup>3</sup>See pages 1 and 2 at “USDA NRCS CONSERVATION PRACTICE STANDARD, BRUSH MANAGEMENT, CODE 314,” September 2009. For links to all of these standards see [http://www.nrcs.usda.gov/wps/portal/nrcs/detail/full/null/?cid=nrcs143\\_026849](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/full/null/?cid=nrcs143_026849).

farms, and most of these were developed and installed without any assistance from NRCS. The NRCS standard in this instance is three pages long, with very specific design criteria and engineering standards, planted species requirements, all to be carried out under a detailed written plan, with limitations on how the waterway can be used and with detailed operations and maintenance requirements. Portions of this standard are good practice and frankly, common sense. However, if I now have to have a plan for all of these and meet the detailed requirements, or face possible litigation under the CWA, the expense in time and money will be enormous and prohibitive.

The same is true for the herbaceous weed control standard. This section contains a great deal of helpful, practical guidance, but it also contains a requirement that a farmer prepare a plan for each field. On a farm such as mine that consists of over 150 fields, this requirement becomes incredibly burdensome. Perhaps not all of these fields are WOTUS, but almost all of them have surface drainage systems with a bed, bank and some kind of channel. Other conservation practice standards have similar problems. In the case of obstruction removal, something as simple as removing sticks or vegetation from a drainage feature could easily become a long and detailed process. Under this new system, what would otherwise be a 10 minute job would require hours of paperwork.

The Rule language states it is being applied in those instances where the conservation practice is being carried out “for the purposes of benefitting” WOTUS. Presumably this means that farmers carrying out such activities *not* for the purpose of benefitting a WOTUS but simply as part of their normal farming operation need not meet the NRCS technical standard to qualify for the exemption. But the referenced MOU that the Agencies and USDA have entered into in accordance with this Rule gives the clear, stated indication that the Agencies expect farmers to meet these standards anytime they are carrying out these activities in a WOTUS.

For example, the MOU states that “(D)ischarges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards” and that (W)here NRCS is not providing technical assistance, the landowner has the responsibility to ensure that implementation of the conservation practice is in accordance with the applicable NRCS conservation practice standard.” Furthermore, the MOU states that “(E)ven where NRCS is not providing technical assistance, the agency plays an important role in helping to respond to issues that may arise regarding project specific conformance with conservation practice standards.”<sup>4</sup> The implication is clear; farmers carrying out these activities in WOTUS must conform to the NRCS practice standard or be subject to CWA enforcement.

In innumerable instances, when farmers are carrying out normal farming activities like brush management they are not doing it for conservation purposes. They will not be working with NRCS on a conservation practice to benefit a WOTUS, nor will they be doing this on their own as a conservation practice. It is simply a normal farming activity. In those instances, farmers must not be required to meet the NRCS conservation practice standard or, in reasonably not doing so, be subject to CWA 404 permitting or enforcement. To require adherence to the conservation practice standard in such instances is well outside anything contemplated by Congress when the section 404(f) exemption was created.

## Conclusion

In summary, the reasons for our serious concerns are as follows:

1. The Rule encompasses a host of practices with a long history of being an ordinary part of a normal, ongoing farming operation and that are sensible and absolutely lawful for farmers to use for reasons not related to conservation and water quality goals;
2. The Rule will result in producers possibly being subject to CWA enforcement anytime they do not follow NRCS standards when they carry out in a WOTUS these specific practices as long-used, normal farming activities commonly conducted for reasons unrelated to conservation and water quality goals;
3. The Rule creates the logical policy presumption that any other normal farming activity must be conducted in conformance to an NRCS practice standard, if an applicable one exists, when carried out in a WOTUS;
4. In effect, the Rule will mean that producers, in order to be certain they are not operating in violation of the CWA and liable for the resulting and consider-

<sup>4</sup>See pages 3 and 4 of “Memorandum of Understanding Among the U.S. Department of Agriculture, the U.S. Environmental Protection Agency, and the U.S. Department of the Army, Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards.”

able penalties, must conduct these practices under some form of NRCS supervision or accountability, and with a complete and accurate documentary record that could withstand a serious legal challenge; and

5. In light of the above, it will cause considerable friction between farmers and USDA–NRCS, given the new mandatory regulatory role USDA–NRCS would have in overseeing farmer practices, and the fact that USDA–NRCS conservation practice standards were devised for use in a voluntary, farmer-driven context and are ill-suited for use as permit terms and conditions.

We believe that these concerns are serious and important enough to require that this Interpretive Rule be withdrawn. There may be some soil and water conservation practices which are unique enough and intended solely for conservation benefits for which this policy might be suited. Should this be possible, we strongly urge the Agencies only to pursue that policy through normal Administrative Procedures Act processes involving formal notice and comment so as to afford farmers the opportunity to protect their interests.

In withdrawing the rule, it is imperative that it be made absolutely clear that this policy, in its original form, was meant to address only those circumstances where a practice was being adopted for conservation purposes to achieve specific water quality objectives. That notice of withdrawal must also specify that such normal farming activities, when carried out as part of an ongoing operation, will qualify for the section 404(f) exemption.

Once again, we thank you for the opportunity to provide you with this testimony and for your decision to hold this hearing so that these important policy matters can be thoroughly reviewed and discussed. Corn growers will continue their efforts to conserve soil, water and nutrient resources and protect water quality, and we look forward to working with you and the Administration to support that good work.

The CHAIRMAN. Thank you, Mr. Bowling, for your testimony.

Now it is my pleasure to ask Mr. Kovarovics for his testimony for 5 minutes.

**STATEMENT OF SCOTT KOVAROVICS, EXECUTIVE DIRECTOR,  
IZAACK WALTON LEAGUE OF AMERICA, INC., GAITHERSBURG,  
MD**

Mr. KOVAROVICS. Thank you very much, and great job on the name. It is a huge frustration for my kids, and I have been telling them, "Get used to it."

So I appreciate, Chairman Thompson, Ranking Member Walz, and Members of the Subcommittee, the opportunity to be here today to testify concerning the Interpretive Rule. I am the Executive Director of the Izaak Walton League of America. We have about 44,000 members across the country and 250 community-based chapters. These folks are working on the ground to conserve and restore natural resources and enjoy hunting, angling, recreational and shooting sports, just about any type of outdoor activity you can imagine, and I am here to share their perspective as well as the perspective of a broader cross-section of the community of Americans who enjoy hunting, angling and outdoor recreation.

I believe it goes without saying that America's hunters, anglers and farmers agree that healthy natural resources are essential to our traditions, our way of life and our economy, and hunters and anglers know that habitat on private land is essential to the health of wildlife all across the country. Moreover, hunting overwhelmingly occurs on private lands, and 78 percent of the days spent afield take place on private lands. Because we share common goals, hunters and anglers are partnering with farmers nationwide. We are working together on restoration projects on the ground and advocating for farm bill programs and funding that directly support the conservation of natural resources on private lands.

Ensuring the nation's streams, wetlands and other waters are healthy is vitally important to the tens of millions of Americans who hunt and fish, for our communities and for the outdoor recreation economy. Wetlands and streams provide vital habitat for fish, ducks and other wildlife. For example, the Prairie Pothole Wetlands or the Northern Plains in southern Canada support 50 percent of the North American duck population an average year and as much as 70 percent of that population when water and grass is abundant.

The ducks who hatch and grow in these wetlands are harvested all across America every fall. Headwater and other small streams provide vital spawning habitat for trout, salmon and other fish and are essential to these fish throughout their lifecycles.

However, following the Supreme Court decisions in *SWANCC* and *Rapanos* and subsequent agency guidance, these vital resources are increasingly at risk today. According to the EPA, 60 percent of the streams in the lower 48 states, streams that flow to drinking water supplies of 117 million Americans are at increased risk of pollution. Wetlands are not only at greater risk; the nation is losing natural wetlands at a growing rate. In the most current *Status and Trends of Wetlands* report from the U.S. Fish and Wildlife Service, the Service concludes wetlands loss increased by 140 percent between 2004 and 2009 period when compared to the previous assessment period of 1998 to 2004. This is the first documented acceleration of wetland loss since the Clean Water Act was passed 40 years ago.

Each year, 47 million Americans head into the field to hunt or fish. These are not simply traditions or hobbies. They are fundamental components of our nation's economy. The money that sportsmen spend in pursuit of their passion supports everything from major manufacturing industries to small businesses in communities across the country. These expenditures directly and indirectly support more than 1.5 million jobs and ripple through the economy to the tune of \$200 billion per year.

Since 1977, the Clean Water Act has included an exemption from the section 404 permit process for normal farming, silviculture and rancher activities. As has been discussed today, the purpose and intent of the Interpretive Rule is to provide more clarity and certainty to farmers and ranchers and others about specific activities that are covered by the exemption for normal farming activities, and the Corps and EPA worked with USDA, as we have heard, to develop this rule and identify the specific conservation practices which meet this definition and are therefore exempt from the 404 process.

I think it is also important to note, as Mr. Bonnie did, that this rule is basically self-implemented. If the standards are followed, folks don't need to get advance determination from the NRCS about whether or not a water is water of the United States or to have pre-approval from the Corps or the EPA for the activity.

In addition to issuing the Interpretive Rule, as folks know, the Corps and EPA have taken steps in the separately proposed waters of the United States rule to more specifically define the waters that are and are not included in the regulatory definition. This is the first time that the agencies have specifically identified types of wa-

ters that are excluded from the regulatory definition, and the waters that are on that list that are excluded include prior converted cropland, groundwater including groundwater draining through subsurface drainage systems, gullies and rills and non-wetland swales. In issuing the Interpretive Rule, this section of the proposed waters of the United States rule, the Corps and EPA have taken additional steps to provide clarity and certainty to farmers and ranchers nationwide.

Over the past few years, stakeholders from across the spectrum including sportsmen and agriculture groups as well as Supreme Court Justices have called on the Corps and EPA to conduct a formal rulemaking to clarify the specific waters covered by the Clean Water Act. Issuance of the Interpretive Rule complements that larger process, and last week the Corps and EPA announced they are extending the comment period, and the comment period on the separate rulemaking has now been extended to be 6 months long.

In closing, the Interpretive Rule provides more clarity and specificity about a wide range of normal farming activities that are exempt from the Clean Water Act. Conserving and protecting streams and wetlands and other waters is vitally important to Americans who hunt and fish and enjoy a wide array of outdoor recreation, and these activities are more than traditions or hobbies. They drive the outdoor recreation economy in America, which totals hundreds of billions of dollars and supports millions of jobs.

Again, I appreciate the opportunity to testify today and I am happy to answer any questions. Thank you.

[The prepared statement of Mr. Kovarovics follows:]

PREPARED STATEMENT OF SCOTT KOVAROVICS, EXECUTIVE DIRECTOR, IZAAK WALTON LEAGUE OF AMERICA, INC., GAITHERSBURG, MD

**Interpretative Rule Regarding the Exemption from the Dredge and Fill Permit Process of the Clean Water Act for Normal Farming, Silviculture and Ranching Activities**

Chairman Thompson, Ranking Member Walz, and Members of the Subcommittee, I greatly appreciate the opportunity to testify today concerning the Interpretive Rule issued by the Army Corps of Engineers and Environmental Protection Agency (EPA), in close cooperation with U.S. Department of Agriculture (USDA), concerning the exemption from the dredge and fill permit process of the Clean Water Act for normal farming, silviculture and ranching activities.

I serve as Executive Director of the Izaak Walton League of America. I am honored to be here today to share not only the perspective of the League but also the perspective of the much broader community of Americans who enjoy hunting, angling and outdoor recreation. The Izaak Walton League was founded more than 90 years ago by anglers, hunters and others who were concerned about the negative impacts of water pollution and unlimited development on outdoor recreation—especially fishing—and the health of fish, wildlife and other natural resources. The founders of our organization understood that clean water and healthy wetlands are essential to robust populations of fish, ducks and other wildlife and, in turn, to enjoyable and successful days in the field.

Today, the League's more than 44,000 members are leading efforts locally to conserve and restore habitat and monitor and improve water quality. Our members and staff actively support farm bill and other government programs that conserve soil, wetlands and other natural resources on farms and ranches nationwide. These members also enjoy hunting, angling, recreational shooting sports, boating and myriad other outdoor recreation activities. And like League members before them, they understand that healthy natural resources, including water and wetlands, provide the foundation for the outdoor traditions they and tens of millions of other Americans enjoy every year.

I believe it goes without saying that American hunters, anglers, farmers and ranchers agree that healthy natural resources are essential to our way of life, our

traditions and our economy. Hunters and anglers know that habitat on private land—especially land used in some form for agriculture—sustains wildlife nationwide. Moreover, hunting overwhelmingly occurs on private land. According to the latest *National Survey of Fishing, Hunting and Wildlife-Associated Recreation*, 78 percent of all days spent hunting occurred on private land. Because we share common goals, American hunters and anglers are partnering with farmers nationwide. We're working together on everything from habitat restoration projects large and small to advocating for farm bill programs and funding that directly supports natural resource conservation on private lands. At the most fundamental level, sportsmen want our partners in agriculture to succeed.

*Healthy Streams and Wetlands Vital to Sportsmen, Communities and the Outdoor Recreation Economy*

Ensuring the nation's streams, wetlands and other waters are healthy is vitally important to the tens of millions of Americans who hunt and fish annually, for communities nationwide and for the outdoor recreation economy.

Wetlands and streams provide vital habitat for fish, ducks and other wildlife. For example, the prairie potholes wetlands throughout the northern plains and southern Canada support 50 percent of the North American duck population in an average year and as much as 70 percent when water and prairie grasses are abundant. A wide array of duck species depend on these wetlands for breeding, nesting and rearing young. Ducks that hatch and grow in these wetlands are harvested throughout the United States every fall. Headwater and other small streams are vital to cold water fish. These waters provide essential spawning habitat for trout, salmon and other fish and are then essential to supporting these fish throughout their lifecycles.

However, following two confusing U.S. Supreme Court decisions (*SWANCC* in 2001 and *Rapanos* in 2006) and subsequent agency guidance, these vital resources are increasingly at risk of being polluted or drained and filled. According to EPA, 60 percent of stream miles in the United States, which provide drinking water for more than 117 million Americans, are at increased risk of pollution. Wetlands are not only at greater risk, the nation is losing natural wetlands at a growing rate. In the most current *Status and Trends of Wetlands* report, the U.S. Fish and Wildlife Service concludes the rate of wetlands loss increased by 140 percent during the 2004–2009 period—the years immediately following the Supreme Court decisions—compared to the previous assessment period (1998–2004). This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago.

Each year, 47 million Americans head into the field to hunt or fish. These are not simply traditions or hobbies—they are fundamental components of our nation's economy. The money sportsmen spend in pursuit of their passion supports everything from major manufacturing industries to small businesses in communities across the country. The economic benefits of hunting and angling are especially pronounced in rural areas, where money brought in during the hunting season can be enough to keep small businesses operational for much of the year. These expenditures directly and indirectly support more than 1.5 million jobs in every corner of the country and ripple through the economy to the tune of \$200 billion per year. Many other forms of outdoor recreation also depend on clean water and a healthy environment. According to the Outdoor Industry Association, boating, including canoeing and kayaking, had a total economic impact of \$206 billion in 2012, supporting 1.5 million jobs.

The story of these economic benefits plays out in local communities around the nation. For example, each year more than 125,000 anglers visit the Driftless Area of Minnesota, Wisconsin, Illinois and Iowa. Some of the Driftless Area's best streams flow through the district represented by Ranking Member Walz. Across the Driftless Area, anglers spend \$647 million annually, which goes directly into the local economy. This spending also produces a "ripple effect" of \$465 million in indirect and induced benefits as those dollars continue to circulate through the economy. The direct spending plus that ripple effect exceeds \$1.1 billion per year. Since 2007, more than 75 miles of stream in this region have been restored, and these restoration projects are extremely effective, increasing fish populations ten-fold, e.g., from 350 fish per mile to 3,500 per mile. On one stream, fishing-related expenditures were less than \$200,000 per year prior to restoration and grew to \$1 million per year after restoration.

In addition to providing critical habitat for fish and wildlife and directly supporting hunting and angling, wetlands also provide a host of other benefits to people and communities across the country. Natural wetlands are arguably the most cost-effective protection against flooding for communities large and small. According to

the National Weather Service, the 30 year average for flood damage is \$8.2 billion annually. Conserving wetlands is an alternative to building higher levees and concrete storm walls and armoring every stream bank with rip-rap.

Wetlands provide essential benefits to rural communities and agriculture. Wetlands help recharge ground water supplies. The National Ground Water Association (NGWA) estimates that 44 percent of U.S. population depends on groundwater for drinking water, either from a public source or a private well. As every Member of this Subcommittee understands, groundwater is vitally important for irrigation. According to NGWA, irrigation accounts for the greatest usage of groundwater—more than 50 billion gallons daily. For example, NGWA reports that more than 90 percent of the water pumped from the Ogallala aquifer—the nation's largest, stretching from South Dakota to Texas—is used for agricultural irrigation. By capturing, storing and slowly releasing water, wetlands replenish vital groundwater supplies on which the American people, agriculture and our economy depend every day.

*Interpretive Rule Provides More Clarity about Agricultural Exemptions in the Clean Water Act*

Since 1977, the Clean Water Act has included an exemption from the section 404 dredge and fill permit process for normal farming, silviculture and ranching activities. Under this provision (section 404(f)(1)(A)), the discharge of dredge or fill material “from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices” is exempt from permitting. Separate provisions exempt “construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches” (section 404(f)(1)(C)) and “construction or maintenance of farm roads or forest roads . . .” (section 404(f)(1)(E)). These exemptions do not apply to activities that would bring waters of the United States into uses for which they had not previously been used or where the flow or circulation of such waters would be reduced.

These statutory exemptions can only be modified by Congress—Federal agencies cannot alter them and are bound by law to follow them. In issuing the Interpretive Rule, the Corps and EPA make clear that the farming, silviculture and ranching exemptions remain in full force and effect. The agencies state, “It is important to emphasize that this interpretive rule identifies additional activities considered exempt from permitting under section 404(f)(1)(A), but does not affect, in any manner, the scope of agriculture, silviculture, and ranching activities currently exempt from permitting under section 404(f)(1)(A) including, for example, plowing, seeding, cultivation, minor drainage, etc.”

The purpose of the Interpretive Rule is to provide more clarity and certainty to farmers, ranchers and others about specific activities that are covered by the exemption for “normal farming activities” in section 404(f)(1)(A). The Corps and EPA worked directly with USDA to develop this rule, which identifies 56 specific agricultural conservation practices that meet this definition and are therefore exempt from the 404 permit process. Furthermore, the Interpretive Rule states, “So long as these activities are implemented in conformance with NRCS technical standards, there is no need for a determination of whether the discharges associated with these activities are in ‘waters of the United States’ nor is site-specific, pre-approval from either the Corps or the EPA necessary before implementing these specified agricultural conservation practices.” When implementing one of these practices as part of an established farming or ranching operation, agricultural producers can move forward with more clarity and certainty.

In addition, USDA, the Corps and EPA have signed a separate memorandum of understanding (MOU) that includes a “process for identifying, reviewing and updating NRCS agricultural conservation practices and activities that may include discharges in waters of the United States that would qualify under the exemption established by section 404(f)(1)(A).” Under this process, the three agencies agree to review the practices at least annually and can identify additional practices that would be covered by the exemption. It is also possible that activities on the initial list could be removed if the agencies conclude they are having a negative, rather than beneficial, impact on water quality.

*Additional Specific Waters Excluded From the Definition of “Waters of the United States”*

In addition to issuing the Interpretive Rule, the Corps and EPA have taken steps in the separately proposed “waters of the United States” rule to more specifically define the waters that are and are not included in the regulatory definition. This is the first time the agencies have identified specific types of waters that are ex-

cluded from that definition. This action will provide additional clarity for stakeholders across the spectrum, including farmers and ranchers.

Section (b) of the proposed regulatory definition of “waters of the United States” identifies 11 specific waters or features that are “not ‘waters of the United States.’” The waters or features most pertinent to agriculture include:

- Prior converted cropland
- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow
- Artificially irrigated areas that would revert to upland if irrigation ceased
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing
- Groundwater, including groundwater drained through subsurface drainage systems
- Gullies and rills and non-wetland swales

In issuing the Interpretive Rule and this section of the proposed “waters of the United States” rule, the Corps and EPA have taken additional steps to provide clarity and certainty for farmers and ranchers nationwide.

*Public Process Provides Opportunity for Broad-based Participation and Input*

Over the past few years, stakeholders from across the spectrum—including sportsmen and agricultural groups—as well as Supreme Court justices have called on the Corps and EPA to conduct a formal rulemaking to clarify the specific waters covered by the Clean Water Act. Issuance of the Interpretive Rule is part of that process. Last week, the Corps and EPA announced they are extending the comment period on this rule for 30 days through July 7. This extension will give interested parties additional time to provide input and recommendations. At the same time, the agencies extended the public comment period on the proposed “waters of the United States” rule through October 20, 2014—providing a total of 6 months for public input.

In closing, the Interpretive Rule provides more clarity and specificity about a wide range of activities that are covered by the exemption from Clean Water Act dredge and fill permitting for normal farming and ranching activities. This is an important step within a larger process designed to provide greater clarity to all stakeholders about the waters that are—and are not—covered by the Clean Water Act.

Conserving and protecting streams, wetlands and other waters is vitally important to Americans who hunt, fish and enjoy a wide array of other outdoor recreation. These activities depend on clean water and healthy habitat, including wetlands. And these activities are more than traditions or hobbies—they drive the outdoor recreation economy in America, which totals hundreds of billions of dollars annually and supports millions of jobs.

I appreciate the opportunity to testify today and would be happy to answer any questions.

The CHAIRMAN. Thank you, sir. I would like to thank all the witnesses for your written testimony that was all well prepared and your oral testimony. I am going to take the liberty of starting with the first 5 minutes of questioning and I will start with Mr. Parrish.

The American Farm Bureau Federation and the other producers on this panel have been very clear about their objections to the Interpretive Rule and concerns with the Administration’s new waters of the United States proposal. Why do you believe that your position is so different from that of the National Farmers Union, who also represents farmers and ranchers?

Mr. PARRISH. That is an interesting question. I have asked President Stallman that exact question, that if he understood fully why the Farmers Union supported this, and his response was, and I concur with it, that Farmers Union made a very quick and snap decision. They had a statement out on this proposal within an hour of it being released. I don’t know of any way they could have looked at 371 pages of clarity and determined that there were not problems for farmers and ranchers. I also don’t think that they looked

at the issues of EPA regulating things that have flow in them only during rainfall events.

Most people—and when Congress passed the Clean Water Act, they looked at the issue of fish-able and swim-able. If you are asking people as to whether or not EPA can regulate either land or a feature that looks like land that may only contain water in it during a rainfall event, they would not believe that. At least we don't think that is what Congress was looking at in 1972 because they used the term *navigable*. So we are not sure exactly why they have come to their position but we clearly understand there is a huge difference in what is in black and white in this proposal and what sometimes the agencies say about it.

The CHAIRMAN. Sure, and my inclination was to trust NRCS at first until I started to really read through this and my concerns quickly arose.

Mr. Fabin, do you think that conservation will actually decline if this Interpretive Rule remains in place?

Mr. FABIN. You know, I would hope not, but I fear that it might. I guess we are more inclined to do the conservation practices because it is part of our values system as a producer, and we look to the NRCS for the guidance on the proper way to do that, and if we are going to start looking to them as a regulatory body, we will be less likely to invite them onto the property or properties for that advice. I think that it will have a negative impact on conservation.

The CHAIRMAN. Yes, and I think that NRCS should look to the experience of other regulatory agencies who don't find a lot of businesses that freely invite and encourage OSHA to show up.

Mr. FABIN. We have never invited them.

The CHAIRMAN. Okay. Enough said.

Mr. Bowling, under the Interpretive Rule, what incentives will corn growers have to enroll in USDA voluntary conservation programs?

Mr. BOWLING. Well, the incentive will lessen. You know, in my opinion, they don't become voluntary. As you noticed, I farm in Maryland. We also deal with a little thing called the Chesapeake Bay Mandate and after dealing with that, we are managing to do that. The only thing that I am clear of and that is certain to me is, I made it through yesterday with no violations. So almost all the practices that I do on my 27 farms that almost 24 of those 27 are on a river or on a stream, the only thing that I know mine are voluntary. I do rely on NRCS for some guidance but I very rarely take part in some of the programs. I do take part in the EQIP program and the precision ag programs to maximize my efficiency and to make sure that the equipment I am using doesn't encroach where I am not supposed to be. So I will continue to do those things, and corn growers will continue to do those things around the country, but as far as again inviting NRCS onto our properties to take a look, that is going to be in jeopardy.

The CHAIRMAN. Thank you.

Mr. Kovarovics, thank you for your organization and what you do. I am a lifetime hunter and fisherman. I grew up in a small family sporting goods business, so—in your testimony, you note that several groups called on the Corps and the EPA to engage in

formal rulemaking on the issue of what waters are governed by the Clean Water Act. Is the decision by the EPA, the Corps and NRCS to issue the Interpretive Rule without a comment period consistent with this process or a concern to your organization?

Mr. KOVAROVICS. Well, the Interpretive Rule is guidance, as I understand it. In some cases, guidance is issued without public comment. In other cases it is. Sometimes it is after the fact. I think you heard from Mr. Bonnie today in terms of learning from this overall process, there is a public process underway now, which provides that opportunity to participate and I encourage everyone to participate in that.

The CHAIRMAN. Well, this will be a very public process from this point forward as the sense of the intensity I hear from the members of this panel. So thank you.

I recognize the Ranking Member for 5 minutes.

Mr. WALZ. Thank you, Chairman. Thank you all for your testimony. It has been very, very helpful, and segueing from the Chairman that the teacher in me knows that this is an important piece of this. We are going to have to, and we know that the folks who feed and clothe this world power the world, about 1½ percent of this country. We heard there are 47 million hunters. We need to keep in mind, that leaves about 250 million Americans who we have to educate about this process, who we have to bring in this so that those snap judgments aren't made, and I encourage all of you and that we encourage USDA is, this is going to have to be a collaborative, transparent matter to get to our common goals, which is clean water, sustainable agriculture and the ability for people to make a living as well as enjoy those legacy outdoor activities and fuel the economy through those. We don't have to make the false choices. We don't have to pick one over the other. We don't have to get into that. But we do have to make clear what those goals are. We do need to make clear as to this rulemaking. The biggest mistake here was, it does not feel to me that there was enough of that input. It doesn't feel like we got enough of that out there. So when I see the picture—and Mr. Parrish is right. When I see that picture you put up there this morning, that looks like a picture that could have been taken this morning in Blue Earth County on Kevin Paap's farm as they are sending me pictures. That is exactly what it looks like, and I think that is a concern.

And I also know that there is not that space between us, and Mr. Kovarovich, you bring this up about how do you—and I would ask each of you, first and foremost, is the NRCS the repository of all best practices on conservation? Are they? How would you respond to that?

Mr. PARRISH. I would say, let me give you a practice that in California is against the law. Farmers in California cannot deep plow, and what I am talking about, deep plowing, I am talking about a 6' deep subsoil. Farmers in your neck of the woods can. Farmers in the Mississippi Delta can. That is the only agricultural practice that I know of where you can pull a plow that EPA says that is not a normal farming practice. So I would argue that there is not anything consistent there and they are not the only repository because the university system are always updating what farmers can do on the land, and I would also say that whether it be the Exten-

sion Service or university systems, our systems evolve over time, and if you lock people in to certain practices, it is a real problem.

Mr. WALZ. That is my point. Is there a fear of that happening, that instead of going to the extension of the University of Minnesota or the University of Iowa to get that information, now you are locked into that?

Mr. PARRISH. Here is the way I would explain it. If these 56 practices—and I heard Mr. Bonnie say that the only way to be in compliance with the Clean Water Act is if you do these 56 practices the way NRCS standards say you have to do them, and they are very prescriptive. They use a lot of *shalls*. If a farmer builds a fence that does not comply with NRCS standards, the cloud then is that he has violated the Clean Water Act. The Clean Water Act is not flexible. It is very rigorous, and you know what? NRCS may not come and check his property or the Corps of Engineers or EPA may not come, but citizen suits, citizen activists can come out and challenge that, and if the neighbor doesn't like where he put that fence or exactly how he built it, they are going to go out there and then start measuring to make sure that the post that he built that fence with is 5'7" apart.

Mr. WALZ. Could I ask Mr. Kovarovichs, do you agree? I don't want to put you on the spot of speaking for an entire industry. I understand you are speaking for your members and you are bringing this up, but do you—and this is where we have to be collaborative. Do you see the concern that Mr. Parrish and those landowners are speaking about on that, of where their concern is of how that could be interpreted?

Mr. KOVAROVICS. Yes.

Mr. WALZ. And how do we alleviate that? Because you have worked closely with landowners before, your organization has. Can't we do that again in this setting?

Mr. KOVAROVICS. I think so, and I look at the projects that we are doing across the country, not only our organization but so many in the sportsmen community working with landowners on the ground, putting conservation on the ground. You know, if standards exist, we are going to be helping to meet those standards. I mean, you want these projects to be successful in their outcomes, right? And I have installed fence. I didn't know there was a standard for doing that necessarily. I do think it is important to understand here that this applies when these activities discharge material into water of the United States. I mean, this isn't putting the fence through the woods type thing. When it comes to putting these standards in place, our organization, Trout Unlimited and others that are working with landowners on the ground, we want to make sure that we are doing it right and help to do that.

Mr. WALZ. Yes, sir?

Mr. PARRISH. Just to clarify, do you know what EPA and the Corps are claiming is a discharge when you build a fence? Have you ever built a fence with—

Mr. WALZ. I have built many miles of it.

Mr. PARRISH. But that is the discharge that they say they can regulate.

Mr. WALZ. Now, that is very difficult for me to explain to my producers in any way possible, and you are not making that case.

Again, we have to stick together on this, those that care deeply about that, and have us all at the table.

My time is up. We will come back again, maybe for a few more questions, but I am of the belief that we can get this right but there are 250 million people that aren't engaged in this the way you are. We have to educate them.

The CHAIRMAN. I thank the gentleman. Now I will recognize the gentleman from Ohio for 5 minutes.

Mr. GIBBS. Thank you, Mr. Chairman.

I guess just to reiterate what you just built on, Mr. Walz to Mr. Parrish, we heard about from Mr. Bonnie on the first panel, it is voluntary, it is voluntary. Well, it seems to me that this interpretative rule isn't very clarifying because it requires producers to be in compliance with the NRCS standards, and if they are not, they are not in compliance and they have had this blanket exemption—agriculture has—for normal farming operations, and anything under normal, it is not—they are not in compliance. You concur with that, right, Mr. Parrish?

Mr. PARRISH. I do. The follow-up questions to Mr. Bonnie should have been then, are they in violation of the Clean Water Act.

Mr. GIBBS. Yes, I was hoping we were going to have time for a second round of questions. That needed to be asked, and he probably would say well, I don't think so, because that is the answer we received last week from the EPA.

So the follow-up on that, if a farmer deviates from the standards, they would not benefit from the exemption under the rule, correct?

Mr. PARRISH. That is correct.

Mr. GIBBS. So then the next question is, who is the—what agency would be the enforcement mechanism to make farmers comply or fine farmers or if they not—because the exemption is not going to work now.

Mr. PARRISH. Well, two things. First, USDA has agreed to in their MOU, and I read where it specifically got quoted where they are going to be at least brought in as part of the arbiter. I disagree with Mr. Bonnie on his characterization of that. Second, the Clean Water Act is not self-policing. The Clean Water Act brings with it citizen suit violations, and believe me, any citizen activist group that disagrees with what you are doing or they take exception to the way you are doing this practice can bring you into court and force you, force you to dot every "i" and cross every "t" as to whether or not you comply with NRCS standards.

Mr. GIBBS. Everyone needs to remember what is creating this is the underlying proposed rule to extend the jurisdiction of the EPA on the waters of the United States and that opens up the Clean Water Act to farmers, landowners, homeowners, everybody to citizen lawsuits and permitting if you don't fall under these specific exemptions, which I really think USDA and NRCS has been rolled here by the EPA.

So Mr. Chairman, I am glad you had this hearing because this is really enlightening to everybody that we are putting at risk our conservation efforts because, as Mr. Fabin stated, you are probably not going to do things because you are fearful that the EPA is going to come in.

I guess another question for Mr. Parrish. Since the underlying rule is the one that we know about, the interpretive is kind of a result of that, would the EPA have authority to come in and make determinations?

Mr. PARRISH. It sounds like they will every year when these look at these practices. I am very concerned that these practices if they are not followed to the letter—and again, I quoted to you the number of practices that are done and I would just, for people that build things like terraces or grass waterways, they do it because they want to. They do it to protect their land, to improve their land. This puts such a cloud over that that I think it is really going to diminish the ability of farmers to do that on their own.

Mr. GIBBS. I do want to follow up an issue that Mr. Bonnie raised, and he might have misstated when he talked about discharges under that, because there was a court case on spray drift, because I believe the court case—that is why my bill is so important, H.R. 935, because essentially the courts ruled that the sprayer is now point source, and when you expand the jurisdiction of waters of the United States, it would require farmers, even though they are applying that pesticide under EPA label, they might have to get a section 402 permit.

Mr. PARRISH. Okay. I really want to—this is an important distinction, and I want to clarify that. Spray drift is different than an actual direct discharge, okay? So that is two different things. And in the picture that I showed of that cornfield, if the farmer drives his sprayer across that area when the water is not there or running off during a rainfall event, that is a direct discharge, and therefore he would need a section 402 permit. Now, if the farmer stayed out of that area and didn't farm it anymore and he normally does, and I would argue that that is an area that only has water in it when it is extensive rain, if he is completely out of that area and there is drift, drift is treated differently than a direct discharge, and a direct discharge is regulated. Drift is illegal under all conditions. So it is illegal under FIFRA.

Now, we can have a sidebar on that, but there is a distinction. Direct discharges are regulated, and this is going to put those direct discharges right into the middle of a farmer's field. EPA didn't develop because—the reason this expands jurisdiction, EPA didn't develop a general permit for agricultural uses. This expands waters of the United States so much that now they are going to have to do a permit because they are going to regulate those kinds of areas I showed in that picture.

Mr. GIBBS. So in those instances, the farmers would have to get section 402 permits for those instances, and I don't know, delays and what the issue would be there.

Mr. PARRISH. That is correct.

Mr. GIBBS. Okay.

Mr. PARRISH. It is huge.

Mr. GIBBS. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I now recognize the Ranking Member for another question.

Mr. WALZ. I thank the Chairman. We have great witnesses here, and this is an important topic we need to hear about.

Again, I would make the case on this is that we should show great concern that our producers are showing this level of concern because in working on these issues over the years, we have had great collaborative efforts and there is that attempt to get their rights. So this expression of frustration, concern and uncertainty is real. We are hearing it across the country and also I am hearing from our sportsmen who know we need to clean our rivers, we need to make sure we get this opportunity.

With that being said, I just had a couple questions for me and for others listening who might not know this. Prior to the Interpretive Rule, how did you, the producers, know what practices qualified as normal activities? How did you know that?

Mr. BOWLING. Well, for me, I do have regular contact with my soil conservation service and NRCS and my FSA office. The most important ways that I learn is from other farmers that are older than me, my father. My grandfather before him taught me the right and wrong ways to do things. I didn't need to be regulated to be told that, and it has been passed down through generations.

And I would like to add that not only am I a farmer because that is my occupation but I hunt because I enjoy it. Our farm is on the river. I boat and I fish because it is time off and I spend that with my family. So there isn't a person in this room that doesn't appreciate the normal practice of farming the way I do and then to enjoy the pristine beauty where my family farm is and where I hope is there for generations to come. So there is nothing that I am going to do that is going to jeopardize that in any way.

Mr. WALZ. Mr. Bowling, do you think there is anything in this Interpretive Rule that makes our waters cleaner?

Mr. BOWLING. I don't specifically know. I mean, I have read through this rule. I just don't see it.

Mr. FABIN. I would have to echo what Mr. Bowling said. My grandfather bought the farm that we are on sometime in the mid to late 1940s and we have been implementing these conservation practices ever since then. So it has been just a rule that that is how I farm. I really didn't look to the NRCS for their regulations. Now, we certainly do go to them for some guidance but it is a way of life for us. It is how we do things.

Mr. WALZ. Could you describe, Mr. Fabin—I don't want to put words in your mouth if it is frustrating or insulting, whatever, these things that your family has done for so long now all of a sudden to be told that well, it is okay what you think, someone else, though, will make that determination?

Mr. FABIN. Yes, it is a little suspicious that we have been given the responsibility for so many years and thought that we were doing it correctly and now they are coming in and sort of implying that we are not.

Mr. WALZ. We are all open to new techniques. I have seen our folks work hand in hand with NRCS and we have heard great success stories. There are folks out there that are experts in this and know stream aquatics and things.

Mr. PARRISH. May I clarify as to what the Clean Water Act says about normal farming?

Mr. WALZ. Yes.

Mr. PARRISH. EPA has two instances that they can recapture a normal farming practice, and that is, if you impair the reach or the flow of water. Those are the only two things that would stop a farming practice from being considered normal. You would have to impair the reach or the flow of the water. So unless you are working directly in a stream, most farming practices don't impair the reach and flow of water.

Mr. WALZ. And you believe, Mr. Parrish, this new one says "Oh, yes, now that runoff you saw from the rain is now there"?

Mr. PARRISH. Grazing, pruning a tree, I don't find any of those practices that would constitute a discharge. I don't find any way that it is impairing the reach or the flow of water. It adds confusion.

Mr. WALZ. From a sportsman's perspective, Mr. Kovarovich, how do we reach this compromise? How do we get there? How do we understand? We understand watersheds are big. We understand the interconnectedness of things and all of that. How would you and how do groups like Izaak Walton League, how do we talk to these producers about, again, collaboratively reaching that common ground on this new interpretation?

Mr. KOVAROVICS. Well, it is probably building on a dialogue and the work that is already going on out there. I mean, there are these partnerships broadly across the country. So many groups are working with individual farmers, private landowners, on many of these projects. If this was an issue for a future project that is taking place in the water of the United States, then there would be that opportunity to work there. I mean, the bottom line for organizations like ours as we are partnering with private landowners on so many issues, and we want conservation to be successful and we are working hard to achieve that outcome.

Mr. WALZ. I am just wondering if in the process now is not too poisoned or whatever you might say to go forward, do we need to come at this a different way because if there are suspicions and if we are breaking down, then I agree with you on this. Long-held partnerships that are going to be strained by this that you are hearing from some of these producers, do we need to take a step back, approach this in a different way to get there. Any thoughts on that?

Mr. BOWLING. I am sorry, I would like to add that groups like Izaak Walton League or Ducks Unlimited or whoever, in my opinion, they should reach out to us as we should reach out to them, come out and visit my farm. I welcome that. I want you to see what I am doing voluntarily. I want you to see how it is working for me on a positive way for fish, for migratory birds, for deer, turkey. It doesn't matter what it is on my farm. We plant food plots. We build migratory-bird ponds. We have areas for other things to graze on.

Mr. WALZ. And they do that, I guess I see the Federal agencies could be the convener of those conversations. I would like to see you two guys working together, which I know you do, to get these answers right. What concerns me is, is when they tell us neither one of you are invited ahead of time to do that, and those are—if they can be the convener of the conversation, then you two can sit.

Mr. Fabin, I am over my time, but if you would answer, I am interested if you had something to add.

Mr. FABIN. Yes, I did. I guess the NCBA has been questioned precisely zero times from the USDA, so that is an easy answer, but I guess maybe a solution to your question is a new Interpretive Rule that says all conservation activities are part of normal farming. That might be one solution.

Mr. WALZ. Fair enough.

Mr. BOWLING. I would like to add, Mr. Thompson, you asked Mr. Bonnie to stay here and listen to our testimony, and he is not here, and we are here talking to you now. You have two producers here that have taken the time to come in. We are not getting paid for this. We are doing it because it is the right thing to do. I firmly believe what I am doing is the right thing and I would have loved for him to have stayed and heard what we had to say. I think he may have probably picked something up.

The CHAIRMAN. Mr. Bowling, I agree. That is why I made that request, and unfortunately, I think that just reflects the attitude of this entire issue that we are dealing with.

I do have just—these are quick questions that actually are better suited for Mr. Bonnie but just very quickly get your response to these three questions. Have our voluntary conservation programs failed? What are your opinions on that? Yes or no?

Mr. BOWLING. No.

Mr. FABIN. Not at all.

Mr. PARRISH. I would say no. I would say they have given us the opportunity for these guys to achieve more than you would if you just give them a permit to farm.

Mr. KOVAROVICS. I would unequivocally say no.

The CHAIRMAN. Mr. Parrish, you used the saying—we use it up north too—if it is not broken, don't fix it. I spent Monday morning on the Chesapeake Bay—quite a ways outside the 5th District of Pennsylvania but we are in the Chesapeake Bay Watershed—with Colonel from the Corps of Engineers, and we have remarkable progress, largely the result of the voluntary efforts of our agricultural community.

The second question is, for those of you who have experience working with the professionals at NRCS—and I appreciate what they do. They are boots on the ground. But, we are talking about significant increase in compliance work. Whether they want to pretend they are not going to be an enforcement agency, the compliance load, based on your experience and interactions with NRCS, are they going to be able to handle this influx, dramatic increase in compliance work, and quite frankly, what happens if we don't get the paperwork processed? I guess we don't feed our citizens.

Mr. BOWLING. Yes, those guys are swamped right now doing what they are doing. You know, most of them are local people who live in the area that work for these agencies. Some of them are friends of mine. Some of them have become friends of mine because of the relationship that I have had as a farmer going in there to make sure that I am in compliance. Every farm that I farm has a conservation plan. Every farm that I farm has a nutrient management plan. That work is done in those offices. They need more help now. I don't see how they can manage to do any more than they

are doing. And my experience is that they get it done but they rush through it just to get it done so it doesn't hold me up from farming. If I don't have a nutrient management plan, I don't have a conservation plan, I can't farm. I can't buy fertilizer if I don't have a nutrient management plan. So it has to be done. We have to be on our regimented cycle of getting all these plans done. They do a great job of doing it right now but I just don't see how the workload can be achieved by the people that they have now.

Mr. FABIN. As a quick example, coming up on 2 weeks ago when I was doing some research for this testimony, I contacted our local NRCS agent and asked him for a list of some of the activities that our operation has done, and I have yet to see that list, so a simple task like that, which should only take him 5 to 10 minutes, he has not been able to accomplish yet. So some of—putting more projects on his plate, it is not going to get us anywhere.

The CHAIRMAN. I am going to close my 5 minutes with just kind of revisiting, Mr. Bowling, replowed ground here, and I quote you from your testimony because it brings up an aspect of this, a threat of this that has been mentioned, but it deserves to be elevated as much as we possibly can. You talked about citizen suits, I have seen this on our National Forests how really citizen suits just interfere with the ability to properly manage land, period. It has completely contrary outcome from what the citizen activist organizations claim that they have. We wind up with unhealthy forests and we are going to wind up with more unhealthy watersheds, and as you talked about with your neighbor, "We have seen this very recently with one of my Maryland neighbors, a broiler farm. Fortunately this specific case the courts ruled in favor of the farmer," and a lot of groups will say well, you always have recourse, you can defend yourself in the judicial system. But the question is at what cost. And you have noted in your testimony at tremendous expense to the defendant, which nearly resulted in bankruptcy. I don't know if this is the preferred outcome of this Interpretive Rule or the waters of the United States but it appears to me that this is a realistic outcome that we can expect unless we can turn this back.

Mr. BOWLING. You are exactly right. I mean, I know the case you are talking about. I don't know the farmer himself but I did donate to his cause because I would hope that if that were me, and thank God it hasn't been yet, that others would help me. The suit brought against him was basically they felt he had dumped chicken litter in an unauthorized spot and it wasn't even chicken litter, it was municipal waste that was permitted to go on that farm. So again, he had to defend himself on something that he was doing exactly by the book. He was doing nothing wrong, and it damn near bankrupted him, and I can tell you that the damage that it did to him and his family was way worse than the bankruptcy. He is now scared to make a move on anything. Again, I hope that doesn't happen to any of my other counterparts but it is a very real scenario that happened.

I see with this implementation here, I worry about that myself. I farm a lot around a lot of multimillion-dollar houses. People come out and watch what I do when I am on the farm next to them. They pay attention to everything that is spray, how I plant, when

I plow, when it rains, how soon I am back in there. Every aspect of what I do is looked at.

The public likes farmers. They don't particularly like the way we farm. They don't like us to do those things. I invite all those neighbors onto my farm. I explain to them what I am spraying when I am spraying. I assure them that I would use nothing on my land that is going to hurt me, let alone them. So once I do that, it seems to go away, but the day is coming when I am not going to be able to explain my situation. I am going to have to prove it in a court of law, and I am not looking forward to that.

The CHAIRMAN. Having spent time during this hearing looking through the fencing NRCS requirements, I have bad news. You can be sued by your neighbors if you have an ugly fence because aesthetics are a part of the standards. Now, I don't know how you measure that.

With that said, I want to thank the panel. Any closing comments?

Thank you so much to everyone for your testimony. I think this has been very helpful as we continue in the process of dealing with this issue.

Under the rules of the Committee, the record of today's hearing will remain open for 10 calendar days to receive additional material and supplemental written responses from the witnesses to any questions posed by a Member.

The Subcommittee on Conservation, Energy, and Forestry hearing is now adjourned.

[Whereupon, at 12:23 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]



SUBMITTED LETTER BY HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS  
FROM PENNSYLVANIA

June 18, 2014

Hon. THOMAS "TOM" J. VILSACK,  
Secretary,  
U.S. Department of Agriculture,  
Washington D.C.

RE: Clean Water Act Jurisdiction and NRCS Technical Standards [EPA-HQ-OW-2013-0820; 9908-97-OW; EPA-HQ-OW-2011-0880; FRL-9901-47-OW]

Dear Secretary Vilsack,

The undersigned Iowa agricultural organizations are writing today to express our concern with recent actions taken by the U.S. Department of Agriculture in collaboration with the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) with regard to the NRCS technical standards and the expansion of Federal jurisdiction under the Clean Water Act (CWA). Because we believe that these actions will impede soil and water conservation progress as the NRCS technical standards become regulatory tools for the EPA and the Corps, the Interpretative Rule should be withdrawn.

The State of Iowa and our organizations are committed to continued progress on soil and water quality improvements. The Iowa Nutrient Reduction Strategy details the scope of the effort necessary to achieve our goals, and its science report is clear that additional management of nutrient application will not provide the desired outcomes without implementing edge of field practices and other conservation infrastructure. The scope of the effort necessarily dictates that many practices will need to be installed with exclusively private funds as there isn't enough cost-share or available technical assistance to achieve these goals.

Farmers are solutions-oriented and are rising to the challenge. According to a recent survey of Iowa land improvement contractors, farmers are investing their own resources into conservation practices without state or Federal financial assistance at a high rate. For example, at least 67% of grassed waterways and 50% of terraces are installed exclusively with personal funds. The survey confirms what has long been known: farmers are committed to conservation and are willing to invest their own resources.

NRCS technical standards, technical assistance and cost-share are voluntary programs. Although farmers may not agree with every requirement in the technical standards, they understand that following the standards is the choice they make when signing up for cost-share. Farmers have long had to consider whether the additional requirements and expense involved with cost-share programs pencil out when compared to self-financing. Farmers that chose to self-finance have the flexibility to accelerate the implementation of practices, design practices according to the needs of the particular location, and avoid the additional paperwork burden. Turning the technical standards into *de facto* regulations for Clean Water Act compliance is contrary to the purpose of these voluntary programs.

The Interpretative Rule requires farmers to follow NRCS technical standards in order to qualify for the "normal farming practices" exemption to CWA § 404 jurisdiction. Without the exemption, farmers are required to obtain a § 404 permit when conducting activities in "waters of the U.S." According to the economic analysis on the proposed WOTUS rule, obtaining this permit will cost months of delay and tens of thousands in additional costs, in many cases far surpassing the cost of installing the conservation practice. Observing the experiences of the state and Iowa's drainage districts in recent projects going through the § 404 permitting process, individual farmers will be unable to navigate or pay for participation in the current permitting system without assistance.

We are also concerned that the list of practices identified in the Memorandum of Understanding is not a comprehensive list of conservation practices. Practices such as grade stabilization structures, terraces, created wetlands, ponds, sediment basins, cover crops, riparian forest buffers, residue and tillage management, contour farming, drainage water management, bioreactors, nutrient management and many other conservation practices are also "normal farming practices." The Interpretative Rule states that it does not affect the scope of the exemption; however, it proceeds to identify that the agencies have determined that only specific, named conservation practices meet the new qualification requirements for the exemption. The rule is not formulated to create a safe haven for those who install conservation practices. It creates uncertainty, trepidation and additional expense for those that want to self-finance their conservation practices.

The Agencies do not have the technical support capacity to implement this rule for the approximately 30 million acres of farmland in the state of Iowa. NRCS technical staff assigned to Iowa has been cut about 20% over the past 5 years. NRCS staff has not been willing to review or verify practices which did not receive Federal technical or financial assistance to determine whether it meets NRCS standards. NRCS does not conduct field visits for practice verification for farmers not receiving Federal assistance. This leaves large numbers of farmers who want to install more conservation with no options for verifying compliance with NRCS standards. The only option remaining to create certainty of compliance is to seek a jurisdictional determination from the Corps, which is also severely understaffed to handle the numbers of determinations that will be required to continue the current pace of conservation implementation in Iowa. Farmers want to do the right thing, but the new interpretation creates uncertainty, and additional expense to minimize the uncertainty. Additional costs and uncertainties will result in fewer conservation practices on the ground, which is inconsistent with Clean Water Act goals.

Many questions about the interpretative rule that have remained unanswered. How is a farmer to know whether his land is a “navigable water” without requesting a jurisdictional determination every 5 years? Will EPA recognize NRCS’s prior converted cropland determinations? Which NRCS technical standards are to be followed: the Federal technical standards or the state NRCS adopted technical standards? What happens when NRCS technical assistance does not result in the technical standards being followed? Grassed waterways and surface drainage pathways in fields have a “bed and bank” and an “ordinary high water mark” until the ground is tilled and reshaped. Will § 402 permits be required to apply crop protection products to this land? Will § 404 permits be required when the ground is tilled? Can an installed conservation practice become a “water of the U.S.” subject to future § 402 permitting requirements? Will the technical standards become more prescriptive, not allowing for site-specific flexibility as EPA gains influence over their content? We have more questions than there are answers about the Interpretative Rule, Memorandum of Understanding and proposed “Navigable Waters” rule.

We are very concerned about the impact of this rule on future conservation progress and the ability of farmers to produce food, feed, fuel and fiber. Rather than eliminating uncertainty, the agencies’ actions will create great hardships on farmers who want to produce food and conserve the land and water while doing it. We encourage you to engage with the Administration and request withdrawal of the Interpretative Rule and Memorandum of Understanding before it endangers the good progress that has been made. We are happy to meet with you to discuss our concerns at your convenience.

Sincerely,

**Agribusiness Association of Iowa,**  
Des Moines, IA;  
**Iowa Cattlemen’s Association.**  
Ames, IA;  
**Iowa Corn Growers Association.**  
Johnston, IA;  
**Iowa Drainage District Association,**  
West Des Moines, IA;  
**Iowa Farm Bureau Federation,**  
West Des Moines, IA;

**Iowa Institute for Cooperatives,**  
Ames, IA;  
**Iowa Pork Producers Association.**  
Clive, IA;  
**Iowa Poultry Association.**  
Urbandale, IA;  
**Iowa Soybean Association,**  
Ankeny, IA;  
**Iowa Turkey Federation,**  
Ames, IA.

SUBMITTED INFORMATION BY HON. GLENN THOMPSON, A REPRESENTATIVE IN  
CONGRESS FROM PENNSYLVANIA



## 382A – Fence (standard wire)

### Conservation Practice Job Sheet

Natural Resources Conservation Service, Oregon

382A OR-JS

November 2005

Client: \_\_\_\_\_



NRCS Photo

#### Definition

A constructed barrier to animals or people.

#### Purposes

This practice is applied to facilitate the application of conservation practices by providing a means to control movement of animals and people

#### Where Used

This practice may be applied on any area where management of animal or people movement is needed. Fences are not needed where natural barriers will serve the purpose

#### Conservation Management System

A fence is a facilitating practice as part of a conservation management system on any land use. The practice is generally used to assist in the improvement or maintenance of ecological conditions to enable prescribed grazing or other applied management to accomplish overall objectives.

#### Plans and Specifications

The standard wire fence specification is used for 3 to 5 wire barbed wire fences, 3 to 5 smooth wire high tensile fences, and 26 to 32 inch woven wire fences (with or without an additional barbed top wire).

Plans and specifications are to be prepared for specific sites based on this standard. Fence type, length in feet, and proposed location are provided to the client. Additional standard drawings may be attached.

Fence plans and designs in Range Technical Note #8, Pasture and Range Fences, Range Technical Note #20, Fence Designs, or "Fences", USDI, BLM and USDA, FS, 1988 will meet design standards.

Plans and specifications for installing fences shall be in keeping with this standard and shall describe the requirements for applying the practice to achieve all of its intended purposes.

#### Operation and Maintenance

**Operation:** Fences should meet the objectives of the conservation management system in providing an effective barrier.

**Maintenance:** Regular inspection of fences should be part of an ongoing maintenance program. Inspection of fences after storm events is necessary to insure the continued proper function of the fence. Maintenance and repairs will be performed in a timely manner as needed.

Retain and properly discard all broken fencing material and hardware. All necessary precautions should be taken to ensure the safety of construction and maintenance crews

**382A OR-Specification**

Natural Resources Conservation Service, Oregon

November 2005

**FENCE (standard wire) SPECIFICATION SHEET**

<b>Client</b>		<b>Date</b>	
<b>Farm/Tract</b>		<b>Field(s)</b>	
<b>Location</b>		<b>Length(s)</b>	
<b>Planner</b>		<b>County/SWCD</b>	

**Design Approval:**

Practice code No.	Practice	Lead Discipline	Controlling factor	Units	Job class				
					I	II	III	IV	V
382	Fence	BCSD Graz Land Spec	Length	feet	All	All	All	All	All
			Animal Units	AUE	25	100	250	350	All
This practice is classified as Job Class (check one):					<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Design Approved by: /s/ \_\_\_\_\_ Date: \_\_\_\_\_

Job title: \_\_\_\_\_

**Client's Acknowledgement Statement:**

The Client acknowledges that:

- They have received a copy of the specification and understand the contents and requirements.
- It shall be the responsibility of the client to obtain all necessary permits and/or rights, and to comply with all ordinances and laws pertaining to the application of this practice.

Accepted by: /s/ \_\_\_\_\_ Date: \_\_\_\_\_

**Certification:**

I have completed a review of the information provided by the client and certify this practice has been applied.

Certification by: /s/ \_\_\_\_\_ Date: \_\_\_\_\_

Job title: \_\_\_\_\_

Refer to the Following Conservation Practice Specifications [X]			
Use Exclusion 472	<input type="checkbox"/>	Prescribed Grazing 528A	<input type="checkbox"/>
Range Planting 550	<input type="checkbox"/>	Critical Area Planting 342	<input type="checkbox"/>
Pipeline 516	<input type="checkbox"/>	Watering Facility 614	<input type="checkbox"/>
Spring Development 574	<input type="checkbox"/>	Wetland Wildlife Habitat Management 644	<input type="checkbox"/>
Upland Wildlife Habitat Management 645	<input type="checkbox"/>	Other:	<input type="checkbox"/>

**USDA Nondiscrimination Statement**

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**382A OR-Specification**

Natural Resources Conservation Service, Oregon

November 2005

**FENCE (standard wire) SPECIFICATION SHEET****1. Management Objectives:**

Additional Narrative: \_\_\_\_\_

**2. Type of Fence (check all that apply):**Barbed Wire ☐ High Tensile Wire ☐ 3-Wire ☐ 4-Wire ☐ 5-Wire ☐Woven Wire ☐ 26 inch ☐ 32 inch ☐ Other (describe) \_\_\_\_\_ ☐**3. Additional Specifications:**

Narrative: \_\_\_\_\_

☐ See attached designs, drawings, and/or maps.**4. CONSTRUCTION SPECIFICATIONS****GENERAL**

Installation shall be in accordance with an approved plan. Details of construction shown on the drawings but not include herein are considered as part of these specifications. Construction activities shall be in accordance with applicable OSHA regulations.

Prior to construction the fence lines shall be cleared of any possible obstruction that would hinder the fence placement and operation.

The soil surface along the fence line shall be relatively smooth such that placement of the bottom fencing member does not exceed the maximum fence member to soil surface spacing specified.

The fence materials shall have an expected life of at least 10 years with routine maintenance. All wood materials except Orange Osage, Western Red Cedar, Juniper and Black Locust that have contact with the soil shall be treated with an EPA-registered wood preservative. Wood posts shall be treated from the butt end of the post to distance of at least 30 inches for line posts and 36 inches for all corner, gate and brace posts. Refer to Table 1 for the life expectancy of treated versus untreated wood posts.

**MATERIALS**

**Wood Posts:** Line posts shall have a minimum top diameter of 3 inches and shall be a minimum of 6 feet in length. Corner, gate and brace posts shall have a minimum top diameter of 5 inches and shall be a minimum of 7 feet in length. Braces shall have a minimum top diameter of 4 inches and shall be a minimum of 6 feet in length.

**Steel Posts:** Steel line posts shall be the "T", "U" or "Y" type with a welded or riveted anchor plate near the bottom (minimum 18 inches square area) and have suitable corrugations, knobs, studs or grooves for fastening the wire. Line posts shall weigh at least 1.33 pounds per linear foot of length and shall be a minimum of 5.5 feet long.

**Steel Pipe Posts:** Steel pipe corner, gate or brace posts shall be a minimum diameter of 2 inches, Schedule 40

(2.375-inch O.D.) and at least 7 feet long. Bracing shall be a minimum of 1-1/2 inch nominal diameter, Schedule 40 pipe. Brace fittings and clamps shall be galvanized.

**Angle Section Posts:** Angle section posts shall have nominal sectional dimensions of 2.5 by 2.5 by 0.25 inches thick and at least 7 feet in length. Braces shall be of the same size dimensions as corner and gate posts and shall be a minimum of 6 feet in length.

Table 1: Life Expectancy of Untreated and Treated Fence Posts (Years)

Kind of Wood	Un-treated	Pressure Treated	Hot and Cold Bath	Cold Soak
Western Red Cedar	12-15	20-25	20-25	-
Lodgepole & Ponderosa Pine	2-4	20-25	15-20	10-20
Aspen or Cottonwood	1-3	15-20	10-15	5-10
Douglas Fir & Western Hemlock	3-6	20-35	15-25	10-20

**Woven Wire:** Woven wire materials shall conform to ASTM A 116. The top and bottom wires shall be zinc-coated, 11-gauge or heavier and the line and stay wires shall be zinc-coated 14.5-gauge or heavier.

**Barbed Wire:** Barbed wire shall be composed of two strands of 12.5-gauge zinc coated wire wrapped around each other, with 2-point 14 gauge barbs spaced no more than 5 inches apart conforming to ASTM A 121.

**Smooth Wire:** Smooth wire shall be a single steel wire of 9-gauge or heavier, two wrapped strands of 12.5-gauge or heavier wire or 12.5-gauge or heavier hi-tensile wire. Wire shall have a minimum tensile strength of 45,000 psi.

**Wire Panel Fasteners:** Staples shall be 9-gauge or heavier and have a minimum length of 1.5 inches, except 1.0 inch staples are allowed on very hard woods.

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**382A OR-Specification**

Natural Resources Conservation Service, Oregon

November 2005

**FENCE (standard wire) SPECIFICATION SHEET**

Fasteners for use with steel posts shall be 12-gauge or heavier zinc coated wire.

**Stays:** Wire stays shall be 9.5-gauge or heavier, zinc coated, twisted wire. The length shall be at least two inches longer than the distance between the top and the bottom strands of the fence. Wood stays shall be sound, straight pieces at least 2 inches in diameter.

**INSTALLATION**

The fence shall be reasonably straight and shall not deviate more than 12 inches between any corner and gate or line brace assembly.

**Post Depth:** Line steel posts shall be set a minimum depth of 1.5 feet and wood line posts shall be set to a minimum depth of 2 feet, unless otherwise specified. Gate, corner and brace posts shall be set to a minimum depth of 3 feet, unless otherwise specified. Steel pipe and angle section posts shall be embedded in a 12-inch circular or square concrete pier, except when set in firm rock.

**Post Spacing:** The maximum post spacing interval shall be 20 feet on fences without fence stays, 25 feet with one stay between posts and 30 feet with two stays between posts.

**Line Bracing:** Line brace assemblies shall be located at all corners, gates and abrupt changes in vertical topography (generally considered as 15 degrees). On straight reaches of fencing line braces shall be installed at a spacing of no more than 1300 feet.

**Wire Spacing:** Wire spacings are as follows, unless otherwise specified:

Table 2: Barbed or High Tensile Wire Fence

Fence Type	Spacing Measured from Groundline (inches)				
3-wire	16	28	40		
4-wire	14	22	30	42-45	
5-wire	5	12	20	30	42-45

**Note:** Where the movement of antelope is a concern, the minimum height of the bottom wire shall be at least 16 inches from the groundline and the wire may be smooth. Antelope crossings shall be provided if sheep-tight fences are built.

**Note:** Oregon Department of Fish and Wildlife recommends maximum fence heights of 42 inches where wildlife crossings are a concern.

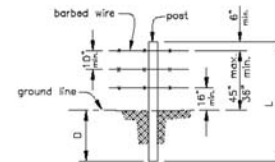
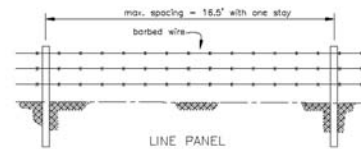
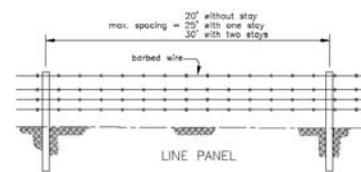
Table 3: Woven Wire/Barbed Wire(s)

Wire Description	Spacing Measured From Groundline (inches)			
26-inch woven	Ground	26	32	42
32-inch woven	Ground	32	42	

**Wire Fasteners:** Staples shall be driven diagonally into the wood grain of the post. Space shall be left between the post and the staple to allow movement of the wire. Fasteners on steel posts shall be snug enough to prevent vertical movement of the wire on the post.

**Stays:** Stays shall be uniformly spaced between the posts as required for the specified post spacing.

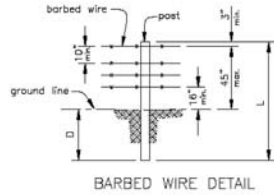
**Drainageways:** In crossing drainageways or depressions a weight or deadman anchor shall be fastened to the fence to maintain the required spacing interval or additional wires shall be added to maintain the required minimum wire height from the groundline.

**a) 3-Barbed Wire or Smooth Wire Fence Details****b) 4-Barbed Wire or High Tensile Wire Fence Details**

## 382A OR-Specification

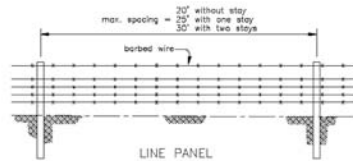
Natural Resources Conservation Service, Oregon

November 2005

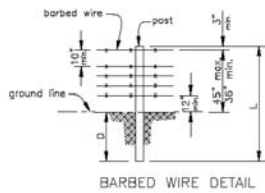
**FENCE (standard wire) SPECIFICATION SHEET**

BARBED WIRE DETAIL

## c) 5-Barbed Wire or Smooth Wire Fence Details

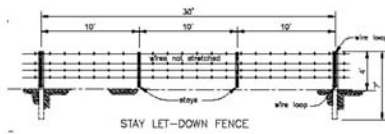


LINE PANEL



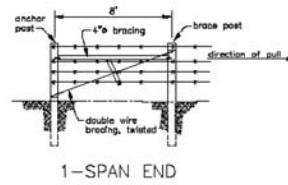
BARBED WIRE DETAIL

## d) Let-Down Fence Details



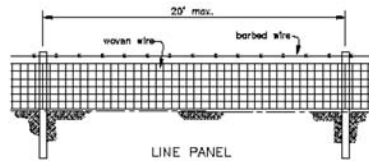
STAY LET-DOWN FENCE

## e) Barbed Wire or Smooth Wire Line Brace Details

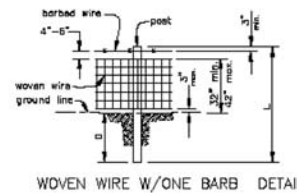


1-SPAN END

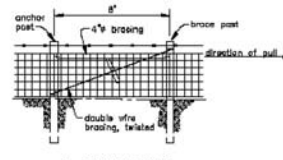
## f) Woven Wire Fence Details



LINE PANEL



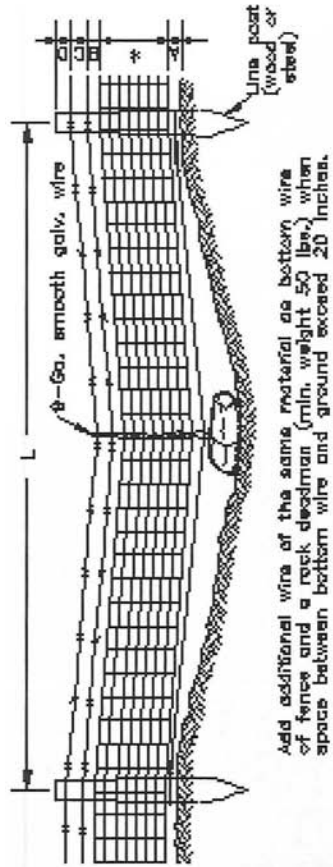
WOVEN WIRE W/ONE BARB DETAIL



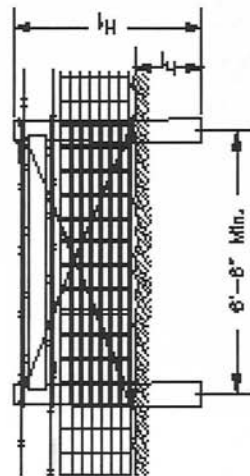
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The Natural Resources Conservation Service provides leadership in a partnership effort to help people conserve, maintain, and improve our natural resources and environment.

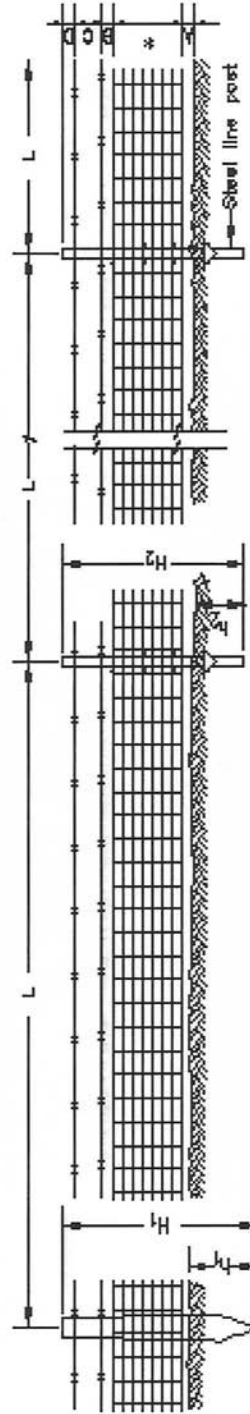
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PANEL AT MINOR DEPRESSION



STRESS PANEL



LINE PANELS





### Definition

Fences are a constructed barrier to livestock, wildlife, or people.

### Purposes

This practice may be applied as part of a conservation management system to facilitate the application of conservation practices that treat the soil, water, air, plant, animal, and human resource concerns.

Locate fences to help facilitate management of different land uses and special management areas within land uses such as ecological sites, pasture types, riparian areas, and critical eroding areas, etc.

For domestic livestock, install fences in areas that will best facilitate the handling, feeding, watering, and movement of livestock managed.

For horses, consider avoiding the use of barbed wire and steel Tee (T) posts when possible in order to minimize potential injury, especially when areas of confinement are small.

Consider introducing animals to electric fencing in designated training facility. Normally, a minimum 12-hour exposure to the electric fence is required. Most animals will be trained in 48 hours.

When installing fences in areas of heavy wildlife activity (such as riparian areas), consider wire types and spacing that may benefit wildlife.

In order to minimize maintenance and installation costs, where practical, avoid areas such as rough and irregular

terrain, excessive trees and brush, areas with long-standing water, and water crossings.

Consider fencing along the contour to minimize livestock trailing and subsequent erosion. When installing interior fences to facilitate livestock movement, temporary fences should be considered in order to minimize costs and allow for system flexibility.

### Fence Types

There are several types of fences that can be used. They can be designed and installed as permanent or temporary. The overall effectiveness of each type of fence and the costs for installation and maintenance depends on the type of animal controlled, the number and size of wires used, post types, and spacing.

**Permanent fence types** are designed to be in place for a period of many years with minimal maintenance requirements. Therefore, components are designed for a life span of about 20 years. Permanent fences are used for exterior (boundary) fencing of property and fencing of specific land uses (such as cropland) as well as for interior division fencing.

**Temporary or moveable fences** are designed to be in place for short periods of time. Temporary fences are best used as division fences for controlled grazing and fencing of areas where livestock exclusion is needed for short periods.

**Standard post (treated wood posts or metal "T" posts) and wire fences (smooth barbed wire or high-tensile)** are the most common fence type used for controlling all types of livestock. They are suitable as permanent fences in areas that receive moderate to

## AL Job Sheet No. AL382 - 2

heavy pressure from livestock. They are typically barbed wire or high tensile smooth wire.

**Suspension fences** are a low cost variation of the standard post and wire fence and can be used as either boundary or interior cross fencing. They are typically used on large pastures with level terrain. They can be either barbed wire or smooth wire. The fence design allows it to sway (move) in the wind and when contacted by animals.

**Both hi-tensile and non hi-tensile woven, net, and mesh wire fences** are best suited in areas where tight control is necessary such as with sheep, goats, horses, hogs, people, or predator control. These fences consist of multiple rows of horizontal smooth wires held apart by vertical wires, usually of different sizes and configurations. Space between wires varies depending on designated use.

**Permanent energized (electric) fences** provide a low cost alternative and more flexibility to the other types of fences. They are mostly used for interior cross fencing but can also be used for boundary fences. They can be powered by a variety of types of energizers. Livestock must be trained to respect electric fences if they are to be effective.

**Temporary electric fences** are only used for interior cross fencing and areas where pressure from livestock is

not heavy. They can be easily attached to permanent fences and can be of high tensile smooth wire, or polyethylene twine and/or tape.

**High tensile, non-energized fences** are suitable as permanent fence in areas that receive moderate to heavy pressure from livestock but require more strands of wire than barbed wire to maintain the same level of control. These fences are safer for domestic animals, especially horses, and wildlife, than are the barbed wire fences.

**Other fence types** include chain link, pipe, vinyl, galvanized panel, and cable fences. These fences are generally more expensive to install and maintain and are typically used around corrals and homesteads. They may be used to restrict access to unsafe areas such as lagoons, abandoned mines, and other unsafe or sensitive areas. They are not addressed in this job sheet or the fence standard.

## References

NRCS AL Conservation Practice Standard:  
[Fence \(382\)](#)  
[Construction Specifications](#)  
[Fence Drawings](#)

Table 1. Barbed Wire and Electric Fence Minimum Requirements for Cattle or Horses.							
TYPE	GAUGE	DESCRIPTION	MINIMUM # OF STRANDS	MAXIMUM POST SPACING WITH STAYS	MAXIMUM POST SPACING WITHOUT STAYS	MINIMUM HEIGHT OF TOP OF WIRE	NOTES
Barbed	12 ½	Galvanized double strand	3 for cross fencing otherwise 4	30 ft.	16 ft.	48 in.	All fences: Bottom wire set a minimum of 14 in. above the ground with middle wires at 10 in. to 14 in. apart.
	15 ½	High tensile steel Class III galvanized, double strand	See above.	30 ft.	16 ft.	48 in.	Four or more strands: Top wire set at least 48 in. above the ground. Maximum stay spacing is 15 feet. Barbed wire may be used for horses, but smooth wire is recommended.
Barbed (suspension)	See above.	See above.	See above.	100 ft.	NA	48 in.	Stays should be placed every 33 in. to 50 feet. Place stays so that they do not touch the ground, allowing the fence to sway. Fences are typically located where ground is nearly level for long distances.
Woven (net/mesh)	12 ½ top and bottom strands, 14 ½ intermediate, and stay wires not more than 12 in. apart	Galvanized coating	NA	16 ft.	NA	42 in.	At a minimum 32 in. woven wire set at ground level with one strand of barbed wire set about 4 in. above the woven wire, and one set about 10 in. above the woven wire. Barbed wire spacing may be closer if woven wire height is higher. Only one strand of barbed wire is required if the woven wire is 39 in. or higher. It shall be installed about 4 in. above the woven wire. If additional wires are installed space them about 4 to 6 inches apart.
	14 ½	High Tensile steel Class III galvanized	NA	25 ft.			

Table 1. Barbed Wire and Electric Fence Minimum Requirements for Cattle or Horses. (con't)						
TYPE	GAUGE	DESCRIPTION	MINIMUM # OF STRANDS	MAXIMUM POST SPACING WITH STAYS	MAXIMUM POST SPACING WITHOUT STAYS	MINIMUM HEIGHT OF TOP OF WIRE
Smooth high tensile electric or non-electric	12 ½	High tensile steel with tensile strength of 170,000 psi and Class III galvanized or aluminum coating	2	150 ft.	50 ft.	30 in. to 40 in.
Temporary	Electroplastic twine or tape	Twine or tape will be woven with at least 6 strands of aluminum or stainless steel strands.	1	NA	NA	See notes.
Temporary	14 gauge	Smooth steel or aluminum	1	NA	NA	See notes.

Bottom wire should be 14 in. to 24 in. above the ground. If additional wires are used, then evenly space wires between the bottom wire and the top set at 48 inches. For two wire electric fences one wire should be hot and one grounded. When more than two wires are used alternate hot and ground wires. Where consistent moist conditions prevail, one strand of hot wire may be used. For boundary fences, use at least 5 strands with the top wire set at 50 in. to 60 in. above ground and the bottom wire set 10 in. to 20 in. above the ground.

Electroplastic twine or tape with 6 strands of wire may be run up to ½ mile. If 9 strands are used, the wire may be run up to a mile. Two strands of twine or tape will be needed under dry conditions. One strand should be positive (+) and the other strand negative (-) or the ground. Place posts as needed and for the intended purpose. Place at least one wire at nose height.

TABLE 2. BARBED WIRE, WOVEN WIRE, AND ELECTRIC FENCE MINIMUM REQUIREMENTS FOR HOGS, GOATS, AND SHEEP.							
TYPE	GAUGE	DESCRIPTION	MINIMUM # OF STRANDS	MAXIMUM POST SPACING WITH STAYS	MAXIMUM POST SPACING WITHOUT STAYS	MINIMUM HEIGHT OF TOP OF WIRE	NOTES
Barbed	12 ½	Galvanized double strand	5	30 ft.	16 ft.	36 in.	All fences: Bottom wire set 4 to 6 inches above the ground with middle wires at 12 in., 18 in., and 26 in. above ground. Maximum stay spacing is 10 feet.
	15 ½	High tensile steel Class III galvanized, double strand					
Woven (net/mesh)	12 ½ top and bottom strands, 14 ½ intermediate, and stay wires not more than 12 in. apart	Galvanized coating	NA	16 ft.	16 ft.	40 in.	At a minimum 32 in. woven wire set at ground level. Two wire strands shall be installed above the top of the woven wire, each 4 to 6 inches apart. For woven wire at least 39 in. tall then at least one wire strand shall be installed about 4 to 6 inches above the woven wire.
	14 ½	High Tensile steel Class III galvanized			25 ft.		
Electric smooth	12 ½	High tensile steel with tensile strength 170,000 psi and Class III galvanized or aluminum coating	5	150 ft.	50 ft.	36 in.	Bottom wire should be no higher than 6 in. above the ground. Wires should alternate between ground and hot. Remaining wires should be spaced at 12 in., 18 in., and 26 in. above ground. Stays should be evenly spaced 50 ft. apart or closer.

Table 3. POSTS.				
TYPE	USE	MINIMUM REQUIREMENTS (diameter)	MINIMUM DEPTHS	NOTES
Wood	Corner/Gate	5 in.	30 in.	Must be sufficient length needed to meet fence requirements. Wooden posts must be treated with creosote coal tar, pentachlorophenol, acid copper chromate, amoniacal copper arsenate, chromated copper arsenate or alkaline copper quat (ACQ). Do not allow aluminum components to contact ACQ treated posts due to corrosion. Posts may also be made from red cedar heartwood, pine heartwood, Osage orange, black and honey locust, catalpa or mulberry. Red cedar heartwood posts shall be at least one-half the post diameter. Corner/gate/pull posts will be set 30 in. deep in concrete in 12 in. diameter hole or set 36 in. deep without concrete.
	Pull			
	Line	3 in.	24 in.	
Metal	Line	Standard "T" or "U" high carbon steel.	18 in.	Note: For a 5 in. post set 30 in. in the ground in a 12 in. diameter hole, approximately 3 (80 lbs.) bags of concrete will be needed.  At least 2 in. of wood post will extend above the last wire strand.  For bracing, use 3/8 in. metal pens or nails. Nails shall penetrate at least halfway into the upright post. Pre-drill nail holes to avoid splitting of brace post.
	Corner/ gate	Wire: 2.5 in. nominal diameter  Woven: 2.875 in. nominal diameter	30 in.	Posts will have an anchor plate and be studded, embossed, or punched for wire attachment. Posts will be galvanized, enameled and baked, or painted with weather resistant steel paint. Posts will weigh at least 1.25 lbs. per linear foot. In sandy soil drive posts deeper than 18 inches.
	Line	NA	NA	Steel pipe must weigh at least 7 lbs. per linear foot and have a water tight end cap. Posts will be set in concrete in 12 in. diameter hole. Concrete must be slightly rounded on top. Posts will be galvanized or painted with a rust-resistant coating and repainted if rusting occurs.
Temporary	Line			Must have good insulation, be easily moved. Space posts to keep the fence at the desired height and provide reasonable support. The proper height should be about 2/3 the animals height or nose height.

Table 3. POSTS. (con't)				
TYPE	USE	MINIMUM REQUIREMENTS (DIAMETER)	MINIMUM DEPTHS	NOTES
Trees	Line, corner, gate, pull	NA	NA	Only to be used in rocky or wet areas where post holes are impossible to dig or in frequently flooded areas where fences are difficult to maintain. Trees should be of sufficient size to minimize swaying and properly aligned. A buffer or treated board will be used between the wire and the tree, or when a buffer cannot be attached to the tree, staples will be driven into the tree and must completely penetrate the sapwood below the outer bark. Where trees are used as corner posts, thread wire through a 6 in. lag bolt instead of wrapping wire around the tree.

U.S. Department of Agriculture

Natural Resources Conservation Service

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**FENCE CONSTRUCTION CHECK SHEET (ELECTRIC)**

Landowner: \_\_\_\_\_ Tract No: \_\_\_\_\_ By: \_\_\_\_\_  
 Field No: \_\_\_\_\_ Length: \_\_\_\_\_ Date: \_\_\_\_\_  
 Fence No: \_\_\_\_\_

	Unit	Minimum	Planned	Installed
<b>I. Wire</b>				
A. Total length	Feet	_____	_____	_____
B. Size	Gauge	_____	_____	_____
C. Strands	Number	_____	_____	_____
D. Nominal wire height	Inches	_____	_____	_____
<b>II. Brace Assemblies (See NRCS Drawings)</b>	Number	_____	_____	_____
A. Post				
1. Kind <sup>1</sup>	Material	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Nominal top diameter	Inches	_____	_____	_____
4. Depth to set	Inches	_____	_____	_____
5. Concrete (80 lb. bag)	Number	_____	_____	_____
6. Amount	Number	_____	_____	_____
B. Cross-member (when required)				
1. Kind <sup>1</sup>	Material	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Nominal top diameter	Inches	_____	_____	_____
4. Amount	Number	_____	_____	_____
<b>III. Line Posts</b>				
A. Wood posts and fiberglass posts				
1. Kind <sup>1</sup>	Material	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Nominal diameter	Inches	_____	_____	_____
4. Spacing	Feet	_____	_____	_____
5. Amount	Number	_____	_____	_____
B. Steel Posts				
1. Kind <sup>1</sup>	Coating	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Weight per foot	Pounds	_____	_____	_____
4. Spacing	Feet	_____	_____	_____
5. Amount	Number	_____	_____	_____
<b>IV. Accessories (all conducting materials will be galvanized)</b>				
1. Strainers or wire tensioners	Number	_____	_____	_____
2. Pull post insulators	Number	_____	_____	_____
3. Line post insulators	Number	_____	_____	_____
4. Ground rods	Number	_____	_____	_____
5. Lightning arrestors	Number	_____	_____	_____
6. Insulated cable	Feet	_____	_____	_____
7. Offset brackets	Number	_____	_____	_____
8. Warning signs	Number	_____	_____	_____
9. Cut off switches	Number	_____	_____	_____
10. Digital volt meter	Number	_____	_____	_____
11. _____	_____	_____	_____	_____
12. _____	_____	_____	_____	_____
<b>V. Power Unit</b>	Type	_____	_____	_____
A. The energizer selected must be high voltage/low impedance, short pulse which can produce at least 4,000 volts. Output with all livestock containment fences charged (on) when under maximum anticipated load.				

<sup>1</sup> Certificate required for new treated posts and metal pipe must be permanently capped and painted or galvanized.

Vicinity Map/Diagram:

Remarks: \_\_\_\_\_

**This design meets or exceeds Fence (Electric) Construction Specifications:**

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

U.S. Department of Agriculture

Natural Resources Conservation Service

AL Job Sheet No. AL382 - 9

**FENCE CONSTRUCTION CHECK SHEET (NON-ELECTRIC)**

Landowner: \_\_\_\_\_ Tract No: \_\_\_\_\_ By: \_\_\_\_\_  
 Field No: \_\_\_\_\_ Length: \_\_\_\_\_ Date: \_\_\_\_\_  
 Fence No: \_\_\_\_\_

	Unit	Minimum	Planned	Installed
<b>I. Wire</b>				
A. Total length	Feet	_____	_____	_____
B. Barbed wire (galvanized)				
1. Size	Gauge	_____	_____	_____
2. Strands	Number	_____	_____	_____
3. Height of top wire	Inches	_____	_____	_____
C. Net Wire (galvanized)				
1. Size (top and bottom strand)	Gauge	_____	_____	_____
(intermediate and stay strands)	Gauge	_____	_____	_____
2. Spacing of stay wire	Inches	_____	_____	_____
3. Height of net wire	Inches	_____	_____	_____
4. Height of fence (top wire)	Inches	_____	_____	_____
5. Strands above/below net wire	Number	_____	_____	_____
<b>II. Corner, End/Gate, and H-Brace Posts</b> (See NRCS Drawings)				
A. Corner and End/Gate Post				
1. Kind <sup>1</sup>	Material	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Nominal top diameter	Inches	_____	_____	_____
4. Depth to set	Inches	_____	_____	_____
5. Amount	Number	_____	_____	_____
B. Cross-member				
1. Kind <sup>1</sup>	Material	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Nominal top diameter	Inches	_____	_____	_____
4. Amount	Number	_____	_____	_____
C. H-Brace post				
1. Kind <sup>1</sup>	Material	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Nominal top diameter	Inches	_____	_____	_____
4. Depth to set	Inches	_____	_____	_____
5. Amount	Number	_____	_____	_____
<b>III. Line Posts (2)</b>				
A. Wood posts				
1. Kind <sup>1</sup>	Material	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Nominal diameter	Inches	_____	_____	_____
4. Spacing	Feet	_____	_____	_____
5. Amount	Number	_____	_____	_____
B. Steel Posts				
1. Kind	Coating	_____	_____	_____
2. Length	Feet	_____	_____	_____
3. Weight per foot	Pounds	_____	_____	_____
4. Spacing	Feet	_____	_____	_____
5. Amount	Number	_____	_____	_____

<sup>1</sup> Certificate required for new treated posts and metal pipe must be permanently capped and painted or galvanized.  
**All gates used must meet or exceed standard for type of fence constructed.**

Vicinity Map/Diagram:

Remarks: \_\_\_\_\_

**This design meets or exceeds Fence (Non-Electric) Construction Specifications:**

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

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**Editor's note:** for the listing **including** the hyperlinks for the documents go to [http://www.nrcs.usda.gov/wps/portal/nrcs/detail/full/null/?cid=nrcs143\\_026849](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/full/null/?cid=nrcs143_026849).

SUBMITTED LETTER BY HON. TIMOTHY J. WALZ, A REPRESENTATIVE IN CONGRESS  
FROM MINNESOTA

July 24, 2014

NANCY K. STONER,  
USEPA Headquarters,  
Washington, D.C.;

JO-ELLEN DARCY,  
*Assistant Secretary of the Army*,  
Department of the Army, Civil Works  
Washington, D.C.

Dear Ms. Stoner and Ms. Darcy:

On April 21, 2014 the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) jointly issued an “interpretive rule” identifying 56 Conservation practices which are now exempt under 404(f)(1) of the Clean Water Act. Since introduction this interpretive rule (IR) has been the subject of much scrutiny. The comment period recently ended with 200+ submissions from various agriculture and environmental stakeholder groups. This IR was also the subject of a hearing in the House Agriculture Subcommittee on Conservation, Energy, and Forestry. I serve as Ranking Member on this Subcommittee. Having read the comments submitted and as a result of the conclusions drawn from this hearing, I respectfully request that you withdraw the interpretive rule. Furthermore, I hope that you will also take this opportunity to both reevaluate the process for producing and finalizing similar future efforts and reconsider the substance of this underlying proposal.

First and foremost, I am concerned with the process by which this interpretive rule was effectively finalized. At the Subcommittee hearing held on June 19, 2014 we concluded that the agencies involved neglected to engage agriculture and conservation stakeholders in any substantive way prior to publication. Had the IR been an internal document of little substantive consequence this failure to engage impacted stakeholders would have been relatively immaterial. This is not the case. To the contrary, I am of the opinion that the IR has regulatory effect and therefore should have been subject to the customary notice and comment period prior to finalizing.

Beyond the question of process, I am also concerned by the substance of the proposal. As mentioned above, I believe this IR has regulatory effect and that this effect may serve to dis-incentivize the very practices we are hoping to promote. Regulatory effect occurs when an individual is coerced by government to perform a specific activity. This coercion is present in the IR. Take for instance conservation practice #382; Fences. Prior to the IR this practice was performed by farmers safe in the knowledge that it was exempt from 404 permitting as a practice incident to “normal farming.” Adding #382 to the list of exemptions is problematic because these exemptions now require that the practice be performed in accordance with NRCS technical standards. The same result which before would have required a certain set of actions now requires a different standard. This is the very definition of coercion. A simple solution to this concern would be to remove practices from the list that are already exempt as “normal farming”. Such practices include but are not limited to; #382—Fences, #460—Land Clearing, #512—Forage and Biomass Planting, and #528—Prescribed Grazing.

Let me be clear, I am not opposed to these standards, having advocated for them in the past, however I am concerned that imposing them as a qualification for exemption has the potential to lead to significant disincentives for conservation practices especially on activities which were clearly exempt before. In the very least this consequence deserves to be debated and various stakeholders engaged prior to a rule such as this going into effect.

For these reasons I respectfully request that you withdraw the rule. Furthermore I hope that future efforts in this space follow the prescribed process of notice and comment prior to finalization and I look forward to actively participating in this process.

Respectfully,



Hon. TIMOTHY J. WALZ,  
Member of Congress.

SUBMITTED LETTER BY STEVE MOYER, VICE PRESIDENT OF GOVERNMENT AFFAIRS,  
TROUT UNLIMITED

July 1, 2014

Hon. GLENN THOMPSON,  
*Chairman,*  
Subcommittee on Conservation, Energy, and Forestry,  
House Committee on Agriculture,  
Washington, D.C.;

Hon. TIMOTHY J. WALZ,  
*Ranking Minority Member,*  
Subcommittee on Conservation, Energy, and Forestry,  
House Committee on Agriculture,  
Washington, D.C.

Dear Chairman Thompson and Ranking Member Walz:

On behalf of Trout Unlimited's (TU) 153,000 members nationwide, I am writing to provide testimony for your June 17, 2014, hearing titled: *A Review of the Interpretive Rule Regarding the Applicability of Clean Water Act Agricultural Exemptions*. I ask that you please include our letter in the hearing record.

TU strongly supports the proposed rule because it will clarify and strengthen the very foundation of the Clean Water Act's protections for important fish and wildlife habitat. Based on our experience working in the field with the Clean Water Act, and the detailed analysis completed by the U.S. Army Corps of Engineers, EPA, and OMB for the proposal, we believe that the new rule is worthy of your engagement and support. It will provide landowners, conservationists, and businesses with substantial improvements in how the law is implemented. In that light, we urge the Subcommittee to engage the agencies' proposal with an eye towards making suggestions that will improve the rule, and urge support for its finalization.

The Clean Water Act is very valuable to TU. Our mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. Our volunteers and staff work with industry, farmers, and local, state and federal agencies around the nation to achieve this mission. On average, each TU volunteer chapter annually donates more than 1,000 hours of volunteer time to stream and river restoration and youth education. The Act, and its splendid goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" serves as the foundation to all of this work. Whether TU is working with farmers to restore small headwater streams in West Virginia, removing acidic pollution caused by abandoned mines in Pennsylvania, or protecting the world famous salmon-producing, 14,000-jobs-sustaining watershed of Bristol Bay, Alaska, we rely on the Clean Water Act to safeguard our water quality improvements.

Conservation of our nation's water resources is not only critically important to TU, but also to the success of the agriculture industry. Partnering with farmers and ranchers is an integral part of the work that we do. In the Midwest Driftless Area (southwest Wisconsin, southeast Minnesota, northeast Iowa, and northwest Illinois), TU's work with dairy farmers has restored watersheds and tripled trout populations in some streams, creating excellent fishing opportunities for sportsmen throughout the upper Midwestern states. In West Virginia, working with dairy farmers and beef ranchers, TU has installed over one million feet of stream-side fencing to reduce the impacts of cattle on streams, while adding upslope water sources to allow cattle access to water. Additionally, TU has worked extensively with ranchers and landowners in many parts of the western United States to upgrade irrigation infrastructure to improve agriculture production while keeping more water in streams to aid watershed health. Much of this good work was funded by farm bill conservation dollars flowing to our agriculture partners.

In our view, the protections for watersheds provided by the Clean Water Act, and the restoration programs provided by the farm bill, fit beautifully together. The two laws work together well in many places around the nation.

Unfortunately, the nation's clean water safety net is broken, and if you appreciate clean water and the Clean Water Act, then you will appreciate the agencies' efforts to resolve the law's most fundamental question: which waters are—and are not—covered by the Clean Water Act. Over the last 15 years, agency guidance following a series of Supreme Court decisions have weakened and confused these protections. The agencies' proposal takes important steps to clarify and restore protections to intermittent and ephemeral streams that may only flow part of the year. These intermittent and ephemeral streams provide habitat for spawning and juvenile trout, salmon, and other species, and protecting these streams means protecting the

water quality of larger rivers downstream. Thus, sportsmen strongly support the reasonable efforts embodied in the proposal from the agencies to clarify and restore the protection of the Clean Water Act to these bodies of water where we spend much of our time hunting and fishing.

I hope that the Subcommittee recognizes the fact that, because of the uncertainties caused by the Supreme Court cases, a rulemaking was sought by many business interests, as well as by Supreme Court Justice Roberts who presided over the *Rapanos* case.

I also urge the Subcommittee to recognize that the proposal works to clarify what waters are **not** jurisdictional. The proposed rule and preamble reiterates all existing exemptions from Clean Water Act jurisdiction, including many farming, ranching, and forestry activities. These exemptions include activities associated with irrigation and drainage ditches, as well as sediment basins on construction sites. Moreover, for the first time, the proposed rule codifies specific exempted waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity. As highlighted above, TU works with farmers, ranchers, and other landowners across the nation to protect and restore trout and salmon habitat. We have a keen interest in ensuring that the proposal works well for landowners on the ground.

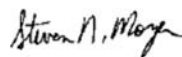
Furthermore, the Interpretive Rule aims to provide more, not less, certainty than before. The Rule recognizes the great conservation strides the agriculture community has made since the 1970s, when the Clean Water Act first came into effect, especially those improvements made via the farm bill conservation programs. The intent of the Interpretive Rule is to clarify that certain conservation practices in waters of the United States following NRCS standards are also exempt from section 404 permitting requirements in addition to the other exemptions provided by the law. We understand that some in the agriculture community are concerned about the Interpretive Rule. We urge them to work with the NRCS and resolve their differences.

We also urge the Subcommittee members to remember the great, and direct, benefit that clean water and healthy watersheds provide to their districts and states. Pennsylvanians, for example, depend on thousands of miles of rivers and streams for clean and abundant drinking water, diverse and abundant fish and wildlife habitat, and local fishing, hunting, bird-watching, and boating recreation that support a strong outdoor recreation economy. According to the Fish and Wildlife Service, more than 1.1 million people fished and 775,000 people hunted in Pennsylvania in 2011. Together, they directly spent more than \$1.4 billion on gear and trip expenditures alone. In Minnesota, more than 1.6 million people fished and 477,000 people hunted in 2011, and they spent more than \$3.1 billion on their trips and equipment. These hunting and fishing economies depend on healthy habitat and clean water. They depend on the Clean Water Act.

Last, the Clean Water Act Interpretive Rule and the farm bill, passed earlier this year under the able leadership of you and your Subcommittee, go hand in hand, creating opportunities for producers and conservationists to work together in watershed management. While the farm bill provides the funding and projects for producers to update aging infrastructure and more effectively manage their land, the Interpretive Rule provides clarity and allows producers to continue with these practices with predictability. The farm bill has spurred aquatic habitat restoration on agricultural land. The Clean Water Act offers protections which ensure that those conservation gains are not undermined by pollution and habitat degradation in other parts of the watershed. This partnership between agriculture and conservation is an essential piece of protecting our nation's water resources and the fish and wildlife that rely on it.

Your Subcommittee helped to give birth to the new farm bill earlier this year. In 1972, Congress gave birth to the Clean Water Act. These laws do, and should even more so over time, work together. But the Clean Water Act has come to a major crossroads. The agencies which the Congress authorized to implement the Clean Water Act, spurred by the Supreme Court itself and a wide range of stakeholders, have put forth a proposal that will help strengthen the very foundation of the law for years to come. As you scrutinize the proposal, we urge you to strongly consider the views of sportsmen and women in Pennsylvania, Minnesota, and others around the nation, and support the reasonable and science-based efforts of the Corps and EPA to clarify and restore the Act's jurisdictional coverage.

Thank you for considering our views,



STEVE MOYER,

Vice President of Government Affairs,  
Trout Unlimited.

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SUBMITTED STATEMENT BY PAUL WENGER, PRESIDENT, CALIFORNIA FARM BUREAU  
FEDERATION

June 27, 2014

House Agriculture Committee,  
Subcommittee on Conservation, Energy and Forestry.

**Re: Comments on the Interpretative Rule regarding applicability of Clean  
Water Act agricultural exemptions**

Dear Chairman Glen Thompson:

The California Farm Bureau Federation (CFBF) has significant concerns regarding the Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers (Corps) Interpretive Rule and Proposed Rule pertaining to the Clean Water Act (CWA). We believe these proposals will leave farmers vulnerable to excessive civil litigation and make recognized good farming practices burdensome. We urge the Committee to consider the cumulative impact of the Interpretative Rule and Proposed Rule especially considering the Interpretative Rule has already taken effect.

CFBF is California's largest farm organization, representing nearly 78,000 members throughout the state, many of whom will potentially be impacted by the agencies action. CFBF strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's natural resources.

EPA's application of the Interpretative Rule without formal rule making seems disingenuous and lacks transparency. We have significant concerns with the Interpretive Rule, which took immediate effect on April 21, 2014 and fundamentally limits recognized good farming practices, which have been afforded "normal" farming exemptions under CWA Section 404(f)(1)(A). In 1977, Congress amended the CWA to exempt "normal" farming, ranching, and silviculture activities from Section 404 "dredge and fill" permit requirements. (33 U.S.C. § 1344(f)(1).) For nearly 4 decades, normal agricultural activities on established operations have been exempt from CWA Section 404 permit requirements. Under the Interpretive Rule, however, these longstanding normal agricultural activities have been extensively narrowed. In order to be exempt from section 404 when undertaking a normal farming activity, a farmer must now satisfy federally mandated Natural Resource Conservation Service (NRCS) practice standards, of which only 56 such standards are included. Failure to comply with the NRCS standard results in a violation of the CWA, subjecting the farmer to hefty penalties. As a result, the Interpretive Rule does not provide "guidance" on normal farming activities deemed exempt under the CWA, nor does it provide clarity on existing exemptions. Rather, it is a "legislative" rule that imposes new, legally binding obligations on farmers and ranchers.

The Interpretative Rule and Proposed Rule, applied together, provide a considerable amount of uncertainty for farmers and ranchers by requiring compliance with NRCS programs and is thus not a true exemption. Requiring compliance with NRCS standards can include consultation and surveying for endangered species with federal or state fish and wildlife services, which can stall the simple construction of a fence or changing crops. The impact to species must be considered but it is not practical when applied to normal, routine farming decisions. This is unreasonable for any farmer who may need to build a fence, construct a pond, plant trees, or dig a ditch in order to operate their farm. Existing state and Federal laws already protect both species and water bodies.

Current regulations cover only wetlands adjacent to waters of the U.S. The Proposed Rule would expand the coverage to include not only wetlands, but all waters adjacent to traditional navigable waters and it would expand the scope of adjacency by including a broad definition of "neighboring" waters. Neighboring would be defined to include "riparian areas" and "floodplains." Although these are not unfamiliar terms to farmers, they will be left for interpretation by the courts and regulators since the CWA does not define them.

A farmer must also consider "other waters" that have, either alone or in the aggregate with other "similarly situated" features, a significant nexus to the more traditional navigable waters mentioned above.

***The Proposed Rule categorically regulates as "tributaries" all ditches that could carry any amount of water which eventually flows (over any distance and through any number of other ditches) to a navigable water.*** Ditches are

commonplace features prevalent across farmland (and the rest of the nation's landscape) and may be regulated by the state. ***The ditch could now be subject to a 404 permit.*** The Corps may not have the resources to take action but farmers are certain to be caught in third party civil litigation that can be costly, even if you are found complying with the law.

Multiple factors go into determining how to keep the farm for the next generation. Crop prices, changing consumer demand and available markets, soil types, natural habitat, endangered species, capital investments and water availability are just some of the facts farmer must consider when deciding what crops to plant. The "normal farming" exemption only applies to farming and ranching activities that have been "ongoing" since 1977. In recent years, farmers of all sizes have recognized the growing demand for wine grapes, olives and tree nuts, which can be grown successfully throughout California and are transitioning to these crops. Any additional layer of permitting or indeterminate delays before planting will negatively effect both beginning farmers as well as those currently farming, from transitioning their farms to growing crops that consumers are demanding for generations to come.

These rules should be practically applied and clearly understood. Applying both the Interpretative Rule and Proposed Rule on the farm as currently written will eliminate many of the longstanding exemptions for on-farm practices. Unfortunately, the on-the-ground application of the rules will end up in the courts, as well intended farmers must defend themselves against civil suits brought by special interest groups with far more legal and financial resources. For a small farmer it can cost hundreds of thousands of dollars to protect oneself against litigation, even when they are ultimately found not in violation of the law, and have no way to recoup the cost from a frivolous lawsuit. This will leave farmers vulnerable and in limbo as they try to comply with the law while growing a perishable crop.

The general public may assume that EPA is simply clarifying its regulation over streams, ditches, wetlands and flood zones that have flowing water and need to be protected. However, ***the Proposed Rule would regulate land without historical consideration of potential water flows.*** The Rules are being used to regulate land as if it were "navigable water". Following the Supreme Court's ruling in SWANCC, ***agency guidance has asserted jurisdiction over "non-navigable tributaries" only after a case-by-case analysis of whether a particular feature has a "significant nexus" to true navigable waters. Key to that analysis is the volume, duration and frequency of flow, as well as proximity to downstream navigable waters. Under the Proposed Rule, the volume, duration and frequency of flow-as well as distance to navigable waters-are deemed irrelevant. See 79 Fed. Reg. at 22206 ("tributaries that are small, flow infrequently, or are a substantial distance from the nearest [navigable water] are essential components of the tributary network . . ."). All such ditches and ephemeral drains will be categorically deemed to be "navigable waters" if they carry any flow that ever reaches navigable waters.***

Existing state and Federal laws are achieving the goal of protecting water bodies. In light of these impacts, Farm Bureau respectfully requests that the Committee urge the Agencies to withdraw the Interpretive Rule and the EPA and Corps' Proposed Waters of the U.S. Rule.

Sincerely,



PAUL WENGER,  
President.

Cc: Honorable GLORIA NEGRETE MCLEOD.